Supreme Court, U.S.
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No.

In the Supreme Court of the United States

IRON THUNDERHORSE,

Petitioner,

v.

BILL PIERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals misinterpret the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, to require only a minimal showing that a prison grooming rule that concededly imposes a substantial burden on religious exercise is the "least restrictive means of furthering [a] compelling governmental interest," contrary to the decisions of other circuits and the literal terms of the statute?

PARTIES TO THE PROCEEDINGS

Petitioner Iron Thunderhorse was the plaintiff in the District Court and the appellant in the Court of Appeals. Respondent Bill Pierce is the Director of Chaplaincy Services of the Texas Department of Criminal Justice and respondent Brad Livingston is the Executive Director of the Texas Department of Criminal Justice. Both respondents were sued in their personal and official capacities.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a-19a) is reported at 2010 WL 454799 and U.S. App., LEXIS 2713. The opinion of the District Court (App., *infra*, 20a-83a) is reported at 2008 U.S. App. LEXIS 58842. The prior opinions in this case (on rulings not sought to be reviewed by this petition for certiorari) are reported at 232 Fed. Appx. 425, 2007 WL 1455940, 2007 U.S. App. LEXIS (5th Cir. May 18, 2007); 418 F.Supp.2d 875, 2006 WL 359723, 2006 U.S. Dist. LEXIS 9997 (E.D. Tex. Feb. 13, 2006); 2006 U.S. Dist. LEXIS 9985 (E.D. Tex. Feb. 13, 2006); 2005 WL 1398644, 2005 U.S. Dist. LEXIS 23154 (E.D. Tex. June 10, 2005).

JURISDICTION

The judgment of the court of appeals was entered on February 9, 2010. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 2 of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1, provides:

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

Section 3 of RLUIPA, 42 U.S.C. § 2000cc-2, provides in relevant part:

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

Section 4 of RLUIPA, 42 U.S.C. § 2000cc-3, provides, in relevant part:

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the

policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

Section 6 of RLUIPA, 42 U.S.C. § 2000cc-5, provides, in relevant part:

In this chapter:
(1) Claimant
The term "claimant" means a person raising a claim or defense under this chapter.
(2) Demonstrates
The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.
* * *
(7) Religious exercise
(A) In general
The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

Texas Department of Criminal Justice Offender Orientation Handbook, Ch. 1 § III.A (2004), provides, in relevant part:

A. Personal Cleanliness and Grooming
* * *

4. Male offenders must keep their hair trimmed up the back of their neck and head. Hair must be neatly cut. Hair must be cut around the ears. Sideburns will not extend below the middles of the ears. No block style, afro, natural or shag haircuts will be permitted. No fad or extreme hairstyles/haircuts are allowed. No Mohawks, tails, or designs cut into the hair are allowed.

5. Female offenders will not have extreme hairstyles. No Mohawk, "tailed" haircuts or shaved/partially-shaved heads will be allowed. Female offenders may go to the beauty shop on their unit; however, going to the beauty shop is a privilege. Female offenders may be restricted from going to the beauty shop as the result of disciplinary action.

STATEMENT

This case presents a single question: whether the courts below incorrectly interpreted RLUIPA to require only a minimal showing that a prison grooming rule is the least restrictive means of furthering a compelling governmental interest. The rule in question prohibits male inmates from having long hair and it makes no exception for petitioner, a prisoner who adheres to a Native American religion that requires long hair. Petitioner is 66 years old, suffers from diabetes, a heart condition, and failing eyesight, and his earliest possible release date is 2023. He seeks to practice his religion in the years

remaining to him and to enter the next life in a condition acceptable under the tenets of his faith. The District Court found that petitioner's religious beliefs were sincere, App., *infra*, at 66a, and recognized "that the wearing of long hair is important to practitioners of Native American religions." *Id.* at 69a (footnote omitted). The Court of Appeals agreed. *Id.* at 8a-9a. Under RLUIPA, respondents therefore had the burden of proving that this restriction on religious freedom was "the least restrictive means of furthering [a] compelling governmental interest." § 2(a), 42 U.S.C. § 2000cc-1(a). In deciding to the contrary, the Court of Appeals aggravated a conflict among the circuits and misinterpreted the literal terms of RLUIPA.

A. Statutory Framework

Congress has twice acted to protect the religious freedom of prison inmates, in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, and in its predecessor, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* In particular, RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden is shown to further "a compelling governmental interest," and does so by "the least restrictive means." § 2(a), 42 U.S.C. § 2000cc-1(a). This Court upheld the constitutionality of RLUIPA in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), acknowledging that Congress condemned "frivolous or arbitrary" barriers to the exercise of religion by

institutionalized persons, and holding that strict scrutiny under RLUIPA did not impermissibly favor religion. *Id.* at 713-17.

A plaintiff under RLUIPA bears the initial burden of demonstrating that the challenged prison policy substantially burdens the exercise of his sincerely held religious beliefs. If the plaintiff proves that the burden on the exercise of his religion is substantial, the defendant must demonstrate that the challenged policies are the least restrictive means of furthering a compelling governmental interest. RLUIPA § 2(a), 42 U.S.C. § 2000cc-1(a). "Demonstrates" means carrying "the burdens of going forward with the evidence and of persuasion." *Id.* § 6(2), 42 U.S.C. § 2000cc-5(2). This case comes down to the question whether respondents carried these burdens under a correct interpretation of RLUIPA.

The prison regulation in this case makes no exception for religious practices and provides as follows: "Male offenders must keep their hair trimmed up the back of their neck and head." Texas Department of Criminal Justice Offender Orientation Handbook, Chapter 1 § III.A.4 at p. 10 (2004), *supra*, at 3-4.

B. Proceedings Below

Petitioner Iron Thunderhorse practices Native American shamanism and is an inmate of the Texas Department of Criminal Justice (TDCJ). App., *infra*,

at 20a. Thunderhorse is 66 years old and is serving a 99-year prison term.[1] Thunderhorse has been incarcerated for more than three decades. *Id.* at 4a. While an inmate of the TDCJ, Thunderhorse has sought to engage in numerous rituals of his Native American religion. From 1994 to 2003, at the Stiles Unit, and at earlier times at various other units of the TDCJ, Thunderhorse was permitted to practice certain of these rituals and, pertinent to this petition, grew his hair long enough to wear it in braids—a fact that is undisputed in this case. *Id.* at 4a & n.1.

In August 2004, Thunderhorse was transferred to the Polunsky Unit of the TDCJ for treatment of various disabilities. App., *infra*, at 29a. At the Polunsky Unit, he no longer received religious accommodations regarding his religious practices and he faced discipline for continuing to have long hair. *Ibid.*; *id.* at 5a. Thunderhorse filed grievances challenging these restrictions, including the restriction on hair length, and has exhausted prison grievance procedures. Only the restriction on hair length is at issue in this petition.

Thunderhorse filed this action asserting claims under RLUIPA and the Constitution for denial of the right to exercise his religion and for denial of other federal rights. Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 1343. By consent of the parties, the lawsuit was referred for all proceedings

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[1] Thunderhorse was originally convicted of robbery, rape, and kidnapping. He received an additional 20-year sentence for attempted escape in 1991.

to a magistrate judge pursuant to 28 U.S.C. § 636(c). In 2006, the magistrate judge granted summary judgment for defendants, a decision which was vacated by the Fifth Circuit because Thunderhorse had not received sufficient notice to allow him to submit evidence in response to defendants' motion. *Thunderhorse* v. *Pierce*, 418 F.Supp.2d 875, 899 (E.D.Tex. 2006), rev'd, 232 Fed. Appx. 425 (5th Cir. 2007).[2] Upon remand, Thunderhorse submitted additional evidence in a bench trial before the magistrate judge.

The magistrate judge denied Thunderhorse's claim under RLUIPA for an exemption from the rule against long hair, but granted him relief in other respects. App., *infra*, at 82a-83a. In particular, the magistrate judge entered an injunction requiring the TDCJ to recognize Native American shamanism as a valid faith. *Id. at* 82a. Respondents took no appeal or cross-appeal from this ruling. Also undisputed is the magistrate judge's finding that the "wearing of long hair is important to practitioners of Native American religions." App., *infra*, at 69a (footnote omitted).

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[2] These rulings are not at issue in this petition, the first because it was vacated and the second because it was in petitioner's favor. Also not at issue are the rulings by the District Court in denying a preliminary injunction and in dismissing defendant Teel from the case because he was no longer employed by the TDCJ. *Thunderhorse* v. *Pierce*, 2006 U.S. Dist. LEXIS 9985 (E.D. Tex. Feb. 13, 2006); 2005 WL 1398644, 2005 U.S. Dist. LEXIS 23154 (E.D. Tex. June 10, 2005). Petitioner no longer contests these rulings.

At trial, Thunderhorse presented evidence of the TCDJ's arbitrary enforcement of the rule against long hair and evidence of the policies of other prisons permitting long hair. *Id.* at 28a, 30a, 34a-35a, 44a. With respect to the arbitrary enforcement of the rule against long hair, the magistrate judge noted that one TDCJ inmate, a witness at the trial, let down his hair "to show the Court that it was well past his collar," in apparent violation of the prison's grooming policy. *Id.* at 35a. When questioned by the magistrate judge, the regional director of the TDCJ, William Stephens, admitted that the witness's long hair resulted from a shortage of officers "and so some matters were overlooked." *Id.* at 44a. The magistrate judge nevertheless held that there was no violation of RLUIPA under governing Fifth Circuit precedent and denied all relief on this claim. *Id.* at 69a-70a, 83a. The District Court's judgment was entered on July 30, 2008, and Thunderhorse filed a timely notice of appeal on August 7, 2008.

On February 9, 2010, the Fifth Circuit affirmed the judgment of the District Court, agreeing that prior Fifth Circuit precedent foreclosed Thunderhorse's claim under RLUIPA. App., *infra*, at 8a-10a. In a footnote, the court rejected Thunderhorse's arguments that the rule was enforced arbitrarily, that it did not apply in the Texas prisons for women, and that other prison systems permit long hair, including the Federal Bureau of Prisons. *Id.* at 10a n.3. The court recognized that the Ninth Circuit had reached a contrary decision in considering exactly the same arguments. *Warsoldier* v. *Woodford*, 418 F.3d 989, 998-1001 (9th

Cir. 2005). But the Fifth Circuit did not analyze the Ninth Circuit's opinion or consider the evidence presented by Thunderhorse because circuit precedent did not permit it to do so. App., *infra*, at 10a n.3.

REASONS FOR GRANTING THE PETITION

I. The Circuits Are in Sharp and Fundamental Conflict Over the Interpretation of Strict Scrutiny Under RLUIPA, as Their Divided Decisions on Prison Grooming Rules Reveal

RLUIPA requires government regulations that impose substantial burdens on prisoners' religious exercise to be "the least restrictive means of furthering [a] compelling governmental interest." RLUIPA § 2(a), 42 U.S.C. 2000cc-1(a). In *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court observed that lower courts should apply RLUIPA with "due deference to the experience and expertise of prison and jail administrators." *Id.* at 723 (citations omitted). But the courts of appeals have disagreed over how much deference can be given to prison officials consistently with the statutory standard of strict scrutiny. The Fifth Circuit stands at the extreme of deferring to the dated and conclusory assertions of prison officials.

The circuit split over hair length restrictions presents a sharply defined, concrete example of a broader and deeper split over the meaning of strict

scrutiny under RLUIPA. Nine circuits have heard challenges under the statute. Seven circuits—the First, Second, Third, Fourth, Seventh, Eighth, and Ninth—require the government to submit specific evidence and closely examine it on the issue of least restrictive means. *Spratt* v. *Rhode Island Dep't of Corrections*, 482 F.3d 33, 38-43 (1st Cir. 2007); *Jova* v. *Smith*, 582 F.3d 410, 415-417 (2d Cir. 2009) (per curiam), cert. denied, No. 09-9237 (Apr. 19, 2010); *Washington* v. *Klem*, 497 F.3d 272, 284-286 (3d Cir. 2007), *Lovelace* v. *Lee*, 472 F.3d 174, 189-193 (4th Cir. 2006); *Koger* v. *Bryan*, 523 F.3d 789, 801 (7th Cir. 2008); *Murphy* v. *Missouri Dep't of Corrections*, 372 F.3d 979, 988-989 (8th Cir. 2004), cert. denied, 543 U.S. 991 (2004); *Warsoldier* v. *Woodford*, 418 F.3d 989, 998-1001 (9th Cir. 2005). Two circuits—the Fifth and Sixth—accept the government's own assertion of what constitutes least restrictive means. *Baranowski* v. *Hart*, 486 F.3d 112, 125-126 (5th Cir. 2007), cert. denied, 552 U.S. 1067 (2007); *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 369-372 (6th Cir. 2005), cert. denied, 549 U.S. 875 (2006). A comprehensive survey of lower court decisions has identified an even broader and more severe division among the circuits. James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053, 2068-2071 (2009).

The seven circuits which have required specific evidence have scrutinized both inconsistent applications of prison policy and alternatives used in other institutions. The Seventh Circuit's decision in *Koger* illustrates this approach. The court examined whether a rule requiring clergy to verify prisoners'

dietary requests was the least restrictive means to achieve orderly food service. 523 F.3d at 801. The Seventh Circuit compared the rule to the practice in federal prisons of only requiring a written statement from the prisoner for dietary accommodations. *Ibid.* Concluding that this was a less restrictive alternative, the Seventh Circuit determined that "the prison officials failed to meet their burden that they were employing the least restrictive means," and accordingly ordered summary judgment for the plaintiff. *Ibid.* Other circuits have applied the same level of scrutiny. *Spratt*, 482 F.3d at 41 n.11 (First Circuit held that the prison could not satisfy its burden with "a blanket statement that all alternatives have been considered and rejected"); *Jova*, 582 F.3d at 417 (Second Circuit remanded for more specific evidence on least restrictive means with respect to prison policies on diet); *Washington*, 497 F.3d at 284 (Third Circuit required government to show that it considered and rejected alternatives to prove its chosen policy is the least restrictive means); *Lovelace*, 472 F.3d at 190 (Fourth Circuit held that "the superficial nature of defendant's explanation" required remand on whether prison's interest was compelling and its policy the least restrictive means); *Murphy*, 372 F.3d at 988-989 (Eighth Circuit remanded for more evidence on consideration of alternatives to ban on group worship); *Warsoldier*, 418 F.3d at 998-1001 (Ninth Circuit required evidence that prison officials considered and rejected less restrictive alternatives).

By contrast, only two circuits—the Fifth and Sixth—have held simple assertions of security or

budgetary interests to be sufficient and rarely considered alternatives from other prison systems. The Fifth Circuit exemplified this approach in *Baranowski*, affirming summary judgment for defendants. The prisoner there sought a kosher diet under RLUIPA, but the Fifth Circuit accepted the assertion of prison officials that denial of a religious diet was "related to maintaining good order and controlling costs and, as such, involves compelling government interests." 486 F.3d at 125. The Sixth Circuit took the same approach in *Hoevenaar*, reversing a preliminary injunction based on the general testimony of prison officials about the difficulty of making individualized exceptions. 422 F.3d at 371.

When this deep-seated difference in approach has been applied to prison rules against long hair, it has resulted in decisions that are all over the lot. Of the seven courts of appeals that have addressed challenges to hair length restrictions under RLUIPA, one has required a religious exception, two have taken the categorical approach of the court below, two have engaged in more detailed analysis to uphold the restriction, and two have upheld restrictions in some cases and required more evidence in others. The Ninth Circuit has held that a prison rule against long hair did not satisfy RLUIPA's least restrictive means requirement. *Warsoldier*, 418 F.3d at 998. The Fifth and Sixth Circuits upheld such restrictions based on minimal evidence, App., *infra*, at 8a-10a; *Hoevenaar*, 422 F.3d at 371-372, while the Seventh and Eighth have relied on more specific evidence to reach the same

conclusion. *Williams* v. *Snyder*, No. 08-1908, 2010 WL 750105, 2010 U.S. App. Lexis 4777 (7th Cir. Mar. 5, 2010); *Fegans* v. *Norris*, 537 F.3d 897, 902-906 (8th Cir. 2008). The Fourth and Eleventh Circuits have upheld some hair length restrictions, while they have required more evidence to support others. Compare *McRae* v. *Johnson*, 261 Fed. Appx. 554, 560 (4th Cir. 2008) (upholding) and *Brunskill* v. *Boyd*, 141 Fed. Appx. 771, 776 (11th Cir. 2005) (upholding) with *Smith* v. *Ozmint*, 578 F.3d 246, 254 (4th Cir. 2009) (more evidence); *Lathan* v. *Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007) (more evidence).

In a conflicting decision explicitly acknowledged by the court below, App., *infra*, at 10a n.3, the Ninth Circuit held that California's hair length policy was not the least restrictive means of achieving prison security. *Warsoldier*, 418 F.3d at 998. The court ordered the entry of a preliminary injunction because the state had offered only conclusory statements that the policy was the least restrictive means. *Ibid.* Instead, the state was required to demonstrate "that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Id.* at 999. The court explicitly noted that the Federal Bureau of Prisons and other state institutions allowed prisoners to choose their own hairstyle without sacrificing prison security. *Id.* at 999-1000. The court also rejected the disparate treatment of male and female inmates because the government had not shown cause for the difference. *Id.* at 1000-01.

At the opposite extreme, the Fifth Circuit in this case did not examine any new evidence to justify the rule against long hair. Instead, the panel decision relied on a precedent, which in turn relied on a precedent, which was ultimately based on evidence that is now more than fifteen years old. App., *infra*, at 8a-10a, relying on *Longoria* v. *Dretke*, 507 F.3d 898, 903-04 (5th Cir. 2007), relying on *Diaz* v. *Collins*, 114 F.3d 69, 72-73 (5th 1997), aff'g 872 F.Supp. 353 (E.D.Tex.1994). In *Longoria*, the Fifth Circuit upheld the district court's dismissal of an RLUIPA challenge to the TDCJ policy even without a response from the state. 507 F.3d at 903-04. The court held this claim to be foreclosed by its prior decision in *Diaz*, which involved a RFRA challenge to the same policy. *Ibid.* In *Diaz*, the Fifth Circuit summarily accepted that the hair length policy was the least restrictive means of achieving prison security. 114 F.3d at 73. It did not consider a single alternative policy, nor did it examine the cost of an individual accommodation. *Ibid.*[3]

As noted, the Sixth Circuit stands with the Fifth in requiring the least support for hair length restrictions. In *Hoevenaar*, the Sixth Circuit accepted a blanket rule against long hair as the least restrictive means for achieving security based on

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[3] In unpublished decisions, the Fifth Circuit has narrowed the scope of *Diaz*, while affirming that it remains dispositive for cases within its scope. E.g., *Odneal* v. *Pierce*, 324 Fed. Appx. 297, 301 (5th Cir. 2009). In the present case, the Fifth Circuit explicitly recognized the continuing force of *Diaz* and the conflict that it creates with the Ninth Circuit. App., *infra*, at 10a n.3.

assertions that recognizing individual exceptions would cause problems, despite the absence of any evidence that previously recognized exceptions had resulted in security incidents. 422 F.3d at 369-71.

The Seventh and Eighth Circuits have upheld hair length restrictions against challenges under RLUIPA, but with the consideration of more specific evidence. *Williams* v. *Snyder*, No. 08-1908, 2010 WL 750105, at *3-*4, 2010 U.S. App. Lexis 4777 at *7-*8 (7th Cir. March 5, 2010); *Fegans*, 537 F.3d at 902-906. In these cases, prison administrators testified to specific examples of hidden contraband and less restrictive policies they had considered and rejected. *Williams*, 2010 WL 750105, at *3-*4, 2010 U.S. App. Lexis 4777 at *7-*8; *Fegans*, 537 F.3d at 902-06. Nevertheless, as the separate opinion in *Fegans* pointed out, none of these cases has required evidence supporting different rules for men and women, beyond generalizations that women simply are less violent than men. 537 F.3d at 912 (Melloy, J., concurring in part and dissenting in part).

The Fourth and Eleventh Circuits have come to different conclusions in different cases. In *Smith*, the Fourth Circuit addressed a South Carolina prison policy which differentiated between male and female inmates and allowed prison officials to forcibly cut inmates' hair to conform to prison rules. 578 F.3d at 249. The Fourth Circuit rejected the government's affidavit—prepared for another case involving a different security unit—attesting that this policy was the least restrictive means for achieving security. *Id.* at 253. In fact, the Fourth Circuit

suggested that accepting such conclusory statements would violate the principles set forth by this Court in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), which required a case-by-case analysis of the government's interest in denying an exemption under RFRA. 546 U.S. at 430-31. In *McRae*, however, the Fourth Circuit upheld Virginia's hair length restriction based on specific examples of contraband in prisoners' hair and medical problems hidden by their hair. 261 Fed. Appx. at 558.

Similarly, the Eleventh Circuit rejected a RLUIPA challenge to a Florida policy limiting inmates to "medium length" hair. *Brunskill*, 141 Fed. Appx. at 774-76. The court provided little analysis, saying only that "the hair length policy * * * [is] the least restrictive means in furthering compelling governmental interests in the security, health, and safety of inmates and staff." *Id.* at 776. Yet in *Lathan*, the Eleventh Circuit vacated the district court's grant of summary judgment because it was dissatisfied with the ten-year-old evidentiary record. 251 Fed. Appx. at 667 (remanding for trial).

The multiple circuit splits—on results, methods, and reasoning over permissible hair length restrictions—reflect the deeper conflict over just what strict scrutiny means under RLUIPA. The circuits are divided on the fundamental question of how much deference can be given to prison officials consistent with strict scrutiny. The courts of appeals have given no indication that they will be able to resolve these conflicts themselves. If anything, the

disarray among the circuits is likely to increase, resulting in increasing disagreement over the meaning of RLUIPA and over the rights that it protects. Review by this Court is necessary to restore the uniformity of federal law.

II. The Conflicting Decisions of the Circuits Raise Important and Recurring Issues of Religious Freedom and Strict Scrutiny, Which Are Clearly Presented by This Case

This case presents an important and recurring question on the standard for judicial review of prison rules that "impose a substantial burden on the religious exercise of a person residing in or confined to an institution." RLUIPA § 2(a), 42 U.S.C. § 2000cc-1(a). In the wake of *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), prison administrators and inmates have vigorously contested whether specific regulations run afoul of the protections afforded by RLUIPA. As noted above, challenges to institutional rules specifically against long hair have arisen in seven circuits, generating substantial confusion and uncertainty over the scope of the rights protected by RLUIPA. These claims represent only a small fraction of the total number of claims brought under RLUIPA, which extend across the full range of religious practices, from religious meetings, to diet, to religious objects. Nelson, *supra*, 95 Va. L. Rev. at 2071-79, 2092-98. As of 2008, the lower federal courts faced prisoner claims for accommodation under RLUIPA in hundreds of cases, and this

number has only grown since then. *Id.* at 2054 & n.4.

The continuing disarray among the circuits reveals the need for guidance from this Court on what satisfies strict scrutiny under RLUIPA. The statute specifically requires prison officials to prove that rules which substantially burden an inmate's religious exercise are "(1) in furtherance of a compelling governmental interest; and (2) the least restrictive means of furthering that compelling governmental interest." § 2(a), 42 U.S.C. § 2000cc-1(a). As this Court recognized in *Cutter*, Congress anticipated that "courts would apply [RLUIPA's] standard with due deference to the experience and expertise of prison and jail administrators." 544 U.S. at 723 (citations omitted). This Court expressed confidence that the lower federal courts would apply RLUIPA's standard "in an appropriately balanced way." *Ibid.* The conflict among the circuits, however, reveals that they have failed to strike any stable balance at all. Whether RLUIPA requires religious exemptions from prison rules against long hair appears to depend entirely on the circuit in which the inmate finds himself incarcerated.

The confusion among the circuits stands in stark contrast to this Court's application of strict scrutiny to protect religious freedom. In *Church of the Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), a local ordinance restricting religious sacrifices was struck down under the First Amendment. As this Court said, "if the object of a law is to infringe upon or restrict practices because

of their religious motivation, the law is not neutral and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest." *Id.* at 533 (citations omitted). Likewise, in *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), this Court subjected a federal statute to strict scrutiny under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* A religious group sought an exemption from the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, for the use of a hallucinogen in religious ceremonies. This Court upheld the claim for an exemption because "RFRA operates by mandating consideration, under the compelling interest test, of exceptions to 'rule[s] of general applicability.'" *O Centro*, 546 U.S. at 436 (citation omitted).

The Fifth Circuit's excessively deferential review in this case vividly illustrates how it undermines the standards for strict scrutiny in other cases. As this Court observed in *Employment Division* v. *Smith*, 494 U.S. 872, 888 (1990): "If the 'compelling interest' test is to be applied at all, then, it must be applied across the board, to all actions thought to be religiously commanded." Otherwise, "watering it down here would subvert its rigor in the other fields where it is applied." *Ibid.* These risks extend well beyond claims for religious freedom to other claims, including those arising in a prison setting. For instance, in *Johnson* v. *California*, 543 U.S. 499 (2005), this Court struck down a practice of racially segregating inmates upon their arrival at a state prison. The prison officials invoked a compelling

interest in prison safety, but this Court held that that alone was insufficient: "Prison administrators, however, will have to demonstrate that any race-based policies are narrowly tailored to that end." *Id.* at 514.

Strict scrutiny also applies, of course, across a range of other constitutional issues. E.g., *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876, 898 (2010) ("[l]aws that burden political speech are subject to strict scrutiny") (citations omitted); *Parents Involved in Community Schools* v. *Seattle School District, No. 1*, 551 U.S. 701, 720 (2007) ("when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny"); *United States* v. *Playboy Entertainment Group*, 529 U.S. 803, 813 (2000) ("if a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest"). The erosion of strict scrutiny in this case does more than depart from the standard adopted by Congress—although that is worrisome enough. It also compromises the integrity of that standard throughout constitutional law.

This case serves as an especially suitable vehicle for resolving the conflicts over the interpretation of RLUIPA. It presents a rare example of prisoner litigation finally resolved on the merits after trial, presenting a single issue for review. This case stands at the opposite extreme from *Jova* v. *Smith*, 582 F.3d 410 (2d Cir. 2009) (per curiam), cert. denied, No. 09-9237 (Apr. 19, 2010), in which two

prisoners petitioned for review of a judgment which was, in some respects, interlocutory. The court of appeals remanded that case for consideration of a religious diet, while the prisoners sought review on related issues. This case presents no such complications.

Petitioner properly exhausted his administrative remedies, as required by the Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e. He fully presented all available evidence and he fully argued the merits to both of the courts below.

III. The Court of Appeals Erred in Concluding That the Prison Grooming Rule Was the Least Restrictive Means of Furthering a Compelling Governmental Interest

The decision of the Court of Appeals cannot be allowed to stand uncorrected. Respondents have not met their burden of proving that an absolute prohibition against long hair, without any exception for religious practices, is the least restrictive means of furthering an interest in prison security. Any such contention is belied by the absence of similarly inflexible policies in numerous prison systems, the complete inapplicability of the rule to women within the TDCJ, and the TDCJ's own inconsistent application of the rule to men. Under RLUIPA, respondents had the burden of demonstrating that the rule is the least restrictive means of furthering a compelling governmental interest. § 2(a), 42 U.S.C. § 2000cc-1(a). They failed to do so.

Numerous prisons systems throughout the country, including the Federal Bureau of Prisons (BOP), do not find it necessary to restrict men's hair length. The BOP's own statement of policy "permits an inmate to select the hair style of their personal choice," 28 C.F.R. § 551.1, and explicitly limits the authority of wardens to do otherwise: "The Warden may not restrict hair length if the inmate keeps it neat and clean." *Id.* § 551.4(a) The BOP does not stand alone in allowing prisoners to have control over their own hair length. A number of the states have adopted the same or similar policies. Evidence in the record, which was admitted and not challenged at trial, reveals that a majority of states either do not restrict hair length or allow exceptions for religious practices. Exh. 5, App., *infra*, at 84a-86a, Tr. at 16, 115 (admission of exhibit at trial and cross-examination of witness who compiled it).

Several prison systems have made their policies on permitting long hair available in publications. E.g., Colorado Department of Corrections, Administrative Regulation: Hygiene and Grooming § IV.A. 1.d (2009), available at https://exdoc.state.co.us/userfiles/regulations/pdf/0850_11.pdf ("An offender who claims that long hair and/or a beard is a fundamental tenet of a sincerely held religious belief will not be required to have a hair cut as long as the offender obtains documentation from the Office of Faith and Citizens Programs' coordinator."); Kentucky Department of Corrections, Policies and Procedure: Hair, Grooming, and ID Card Standards § 2.A (2008), available at http://www.corrections.ky.

gov/NR/rdonlyres/E3C6E5A8-3782-48C8-B162-ACA0923D73A0/160611/1598.pdf ("An inmate may * * * [c]hoose the length of his hair."); Michigan Department of Corrections, Policy Directive: Humane Treatment and Living Conditions of Prisoners § D (2009), available at http://www.michigan.gov/documents/corrections/03_03_130_270875_7.pdf ("Prisoners shall be permitted to maintain head and facial hair in accordance with their personal beliefs provided that reasonable hygiene is maintained."); Oregon Department of Corrections, Inmate Hygiene, Grooming, and Sanitation Standards, Or. Admin. R. 291-123-0015 § 2(a) (2010) ("Head and facial hair must be maintained daily in a clean and neat manner.").

These prison systems include the full range of range of prisons, from minimum to maximum security, and they face the same issues of preserving prison security as the TDCJ. Following their example, the TDCJ could allow a narrow religious exemption as envisioned by RLUIPA, which provides that the government may accommodate religious practices by "retaining the policy or practice and exempting the substantially burdened religious exercise." § 4(e), 42 U.S.C. § 2000cc-3(e). The TDCJ has failed to articulate why other prison systems, with an indistinguishable interest in prison security, can accommodate religious practices while it cannot.

Respondents have presented nothing more than conclusory statements to meet their burden of proof under RLUIPA. At trial, the regional director of the TDCJ advanced only unsubstantiated opinions about

possible problems of identification, hidden contraband, and hair pulling. Tr. at 222-25. He offered no specific examples in which long hair had actually caused such problems and he did not refer at all to the experience of other prison systems. Far from supplying specific reasons why a religious exception would never be feasible, the director admitted that other exceptions occurred anyway because the prisons were understaffed. *Id.* at 222; App., *infra*, at 44a.

So far from establishing that the rule against long hair is narrowly tailored, the TDCJ's own policies demonstrate the contrary. While the TDCJ requires that men keep their hair short, it allows women to have almost any hairstyle they choose, so long as it is not "extreme." Texas Department of Criminal Justice Offender Orientation Handbook, Ch. 1 § III.A.5 at p. 11 (2004), *supra*, at 3-4. Respondents have presented no evidence that women are less able than men to hide contraband in their hair, that they can less easily change their appearance, or that they are less vulnerable to attack because of their long hair.

This inconsistency directly undermines any assertion that the absolute rule against long hair is narrowly tailored. In *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), this Court held that a statutory exception for peyote use by Native Americans demonstrated that the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, could accommodate other exceptions for religious practices. The defendants in that case accordingly

failed to meet the requirements of strict scrutiny under RFRA. *Id.* at 432-34. Even more so in this case, the wholesale exception for women demonstrates the need to allow an exception for petitioner's religious exercise. Respondents have failed to explain how the double standard in the TDCJ's grooming policy serves the asserted interest in prison security.

Wholly apart from these defects, the inconsistent and arbitrary enforcement of the rule against long hair defeats any claim that it is narrowly tailored. There are several visible exceptions to the rule, despite respondents' claims that it must be uniformly enforced. Thunderhorse, in fact, was originally allowed to have long hair while in administrative segregation in the Stiles Unit. App., *infra*, at 28a. It was only when he was transferred to a different prison that Thunderhorse was no longer permitted to grow his hair long or to keep his braids, once cut, with his personal property. *Id.* at 28a-29a. In addition, as the magistrate judge noted, Thunderhorse was not the only prisoner allowed to keep hair longer than the regulations prescribed. One of the inmate witnesses, Sidney Byrd, had hair that fell down "well past his collar." *Id.* at 34a-35a.[4] In explanation, the regional director of the TDCJ could only observe that the prison was understaffed, "and so some matters were overlooked." *Id.* at 44a. If the Texas prisons cannot afford to enforce the rule

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[4] The transcript of the trial reveals that Byrd was disciplined for this violation of the rule against hair length only after he was called to testify at trial, long after he had grown his hair to that length. Tr. at 98-99.

they have, then they cannot enforce it against religious practices. If budget constraints result in de facto exceptions, then the same constraints cannot be invoked to deny exceptions for religion.

In *O Centro*, this Court "looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." 546 U.S. at 431. An existing exception in that case, as in the present one, demonstrated the feasibility of the proposed accommodation. *Id.* at 434-35. Strict scrutiny requires a specific inquiry into the religious exemption sought by petitioner. There is no indication that the TDCJ has made such an inquiry. Petitioner is an elderly, diabetic, and legally blind inmate, with the safest possible security rating in the Texas prison system. The TDCJ has done no assessment indicating that inmates with similar religious beliefs and a similar security rating should be subject to the same restrictions as the general prison population. More than one circuit has held that the failure to consider exemptions on such grounds defeats any attempt to prove that a policy is narrowly tailored. *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Smith* v. *Ozmint*, 578 F.3d 246, 253-254 (4th Cir. 2009).

Whatever deference is due to prison officials, it must be to a policy based on more than conclusory assertions about the need for general rules. The TDCJ's policy typifies the "inadequately formulated prison regulations and policies grounded on mere

speculation, exaggerated fears, or post-hoc rationalizations" that Congress subjected to strict scrutiny in RLUIPA. 146 Cong. Rec. S7774 at S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy). Respondents' arguments fare no better than those of the federal officials in *O Centro*: "The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." 546 U.S. at 436.

The TDCJ's ostensibly absolute rule against long hair has limited scope, inconsistent enforcement, and little justification. Respondents have failed to prove that the rule, in its present form, is the least restrictive means of furthering a compelling governmental interest.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 2010

APPENDIX

APPENDIX A

In the
United States Court of Appeals
For the Fifth Circuit

No. 08-40821

IRON THUNDERHORSE,

Plaintiff-Appellant,

v.

BILL PIERCE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAPLAINCY DIRECTOR; RON TEEL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS COORDINATOR OF NATIVE AMERICAN RELIGIOUS PROGRAMS; UNIDENTIFIED DOES; AND BRAD LIVINGSTON,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas, Lufkin Division.
USDC No. 9:04-CV-222

DECIDED FEBRUARY 9, 2010

Before KING, BARKSDALE, and ELROD, *Circuit Judges.*

PER CURIAM:*

This appeal arises from a bench trial involving claims brought pursuant to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc-2000cc-5, and 42 U.S.C. § 1983, against Defendants-Appellees who are officials or employees of the Texas Department of Criminal Justice-Institutional Division ("TDCJ"). *Pro se* Plaintiff-Appellant Iron Thunderhorse, a prisoner in the custody of the TDCJ, contends that the magistrate judge improperly dismissed his claims that Defendants violated his free-exercise rights under RLUIPA by (1) denying him permission to grow his hair, (2) prohibiting him from performing pipe ceremonies in his cell, and (3) denying him access to a colored headband. Thunderhorse also argues that the TDCJ's failure to explicitly recognize Native Americans as a racial category (as opposed to "Other") denies him certain prison benefits. With respect to the bench trial, he alleges that the magistrate judge inappropriately denied both his request to subpoena two witnesses and his motion for a jury trial. He further claims that the magistrate judge was biased against him and the

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

attorneys for Defendants committed discovery abuse. For the reasons set forth below, we AFFIRM.

I. PROCEDURAL AND FACTUAL BACKGROUND

Thunderhorse filed this action in October 2004, and this is the second time that this case has come before us. The magistrate judge had previously granted summary judgment for Defendants on the RLUIPA claims now before us. *See Thunderhorse* v. *Pierce*, 418 F.Supp.2d 875, 899 (E.D.Tex.2006), *rev'd* 232 Fed. Appx. 425 (5th Cir.2007). On appeal, we found that the magistrate judge did not give Thunderhorse sufficient notice so that he could properly respond to Defendants' motions, and the lack of notice resulted in Thunderhorse's failure to file a "large amount of evidence." *Thunderhorse*, 232 Fed. Appx. at 427. Accordingly, we vacated the grant of summary judgment and remanded the case for the magistrate judge to consider the motions in light of the previously unfiled evidence. *See id.* Instead of reconsidering the summary-judgment motions, the magistrate judge held a bench trial on April 1, 2008. At the pre-trial conference and again at trial, Thunderhorse objected to the magistrate judge's denial of his request for a jury trial and his motion to subpoena Debra Liles and Chaplain Al O'Brien, former employees of the TDCJ, as trial witnesses.

On July 20, 2008, the magistrate judge issued an opinion granting the following injunctive relief: (1) the TDCJ shall recognize Native American Shamanism as a valid faith with its own "faith code";

(2) "Thunderhorse shall be permitted to request the designation of a reasonable number of holy days and to request traditional foods for feast days, in conformity with TDCJ regulations"; and (3) if Thunderhorse is released from administrative segregation, the TDCJ shall not unreasonably deny him access to pipe ceremonies, a medicine bundle, a clay flute, and a small drum. She denied all other relief that Thunderhorse sought. The facts set forth below were developed at the bench trial.

Thunderhorse claims that he is the "Grand Sachem" (Chief) of the Quinnipiac Indians, a part of the Algonquian Confederacy. His faith is Native American Shamanism. Although Thunderhorse has submitted an application for federal recognition of the Quinnipiac, it is not a federally recognized tribe.

Thunderhorse first entered the TDCJ in 1967. He has been released and re-incarcerated at least three times, and he has remained incarcerated since 2002. His current problems with the TDCJ began when he transferred from the Stiles Unit of the TDCJ to the Polunsky Unit in August 2004. Before arriving at the Polunsky Unit, Thunderhorse claims that he was able to maintain long hair (with braids that fell to his lower back),[1] wear a colored headband, perform pipe ceremonies, and possess other religious items. According to Thunderhorse, the TDCJ provided these accommodations while he was in the general population and when he was confined to administrative segregation.

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[1] Indeed, these severed braids, which we have inspected, were part of the appellate record.

When he first arrived at the Polunsky Unit, he was in the general population. He alleges that the staff there harassed him about his religion and ethnicity, and the guards confiscated his medicine bag, religious medallion, and quartz crystal. According to Thunderhorse, this harassment resulted in an altercation with a guard in June 2006. As a result, the TDCJ assigned him to administrative segregation. While there, he is not allowed to attend pipe ceremonies, conduct a personal pipe ceremony in his cell, or possess a flute or drum. In addition, the TDCJ prohibits him from wearing a colored headband, and the TDCJ refuses to grant him an exemption to its hair length restriction. However, the TDCJ does allow him to wear a white headband. All inmates at the Polunsky Unit must abide by the headband and hair length policies.

II. STANDARD OF REVIEW

We review the magistrate judge's legal conclusions at a bench trial de novo and her findings of fact for clear error. *Adkins v. Kaspar*, 393 F.3d 559, 563 (5th Cir.2004) (citation omitted). Because Thunderhorse is a *pro se* litigant, we construe his briefs liberally and "apply less stringent standards" than to parties represented by counsel. *Grant v. Cuellar*, 59 F.3d 523, 524 (5th Cir.1995).

III. DISCUSSION

A. The RLUIPA Free-Exercise Claims

The core of this appeal is Thunderhorse's contention that certain policies of the TDCJ violate his rights, under RLUIPA, to freely exercise Native American Shamanism. Specifically, he complains that the TDCJ prohibits him from growing his hair and from performing religious pipe ceremonies in his cell. He also complains that the TDCJ prohibits him from wearing a colored headband.

1. Legal Standards

RLUIPA mandates that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution * * * even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person-
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). "RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005).

An inmate-plaintiff seeking relief under RLUIPA bears the initial burden of demonstrating that the

challenged prison policy substantially burdens his exercise of religion. *See* 42 U.S.C. §§ 2000cc-1(a)-2000cc-2(b). To meet this burden, the plaintiff must show (1) that the burdened activity is a "religious exercise," and (2) that the burden is substantial. RLUIPA defines "religious exercise" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). In *Adkins v. Kaspar*, we defined "substantial burden" as follows:

> [A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs. * * * [T]he effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs.

393 F.3d 559, 570 (5th Cir.2004) (citations omitted). This inquiry "requires a case-by-case, fact-specific inquiry to determine whether the government action or regulation in question imposes a substantial burden." Id. at 571.

If the plaintiff satisfies this threshold requirement, the burden shifts to the defendant to demonstrate that the challenged policies are the least restrictive means of furthering a compelling

governmental interest. *Baranowski v. Hart*, 486 F.3d 112, 124 (5th Cir.2007) (citation omitted). In making this determination, the court must give due deference "to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (citation omitted). RLUIPA "is not meant to elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline or to control costs." *Baranowski*, 486 F.3d at 125 (citation omitted).

Thunderhorse's primary contention here is that the magistrate judge failed to analyze his claims under RLUIPA's compelling-interest, least-restrictive-means standard of review.

2. The TDCJ's Hair length Policy

The magistrate judge properly found that *Diaz v. Collins*, 114 F.3d 69 (5th Cir.1997), and *Longoria v. Dretke*, 507 F.3d 898 (5th Cir.2007), foreclosed Thunderhorse's RLUIPA claim against the TDCJ's hair length policy. In both cases, the plaintiffs, like Thunderhorse, were prisoners who, for religious reasons, sought permission not to cut their hair. *Diaz*, 114 F.3d at 70 (following the religious practices of the Aztecs); *Longoria*, 507 F.3d at 900-01 (practicing his religion as a Mexica Nahua Native American). In both cases, we found that the policy substantially burdened (or the plaintiff had

sufficiently pleaded that the policy substantially burdened) a religious exercise. *See Longoria*, 507 F.3d at 903; *Diaz*, 114 F.3d at 72-73. But we upheld the policy as the least restrictive way to serve a compelling governmental interest-prison security.

In *Diaz*, which arose under RLUIPA's predecessor statute, the Religious Freedom Restoration Act ("RFRA"), we explained that prisoners may hide weapons and other contraband in their hair. 114 F.3d at 73. In addition, requiring short hair makes it more difficult for an escaped prisoner to alter his appearance from the photographs that the TDCJ periodically takes of each inmate. *Id.*[2] In light of these concerns, we held that "the security interest at stake cannot meaningfully be achieved appropriately by any different or lesser means than hair length standards." *Id.*

In *Longoria*, 507 F.3d at 904, we affirmed the district court's dismissal of Longoria's RLUIPA claim even though the district court did not determine whether the policy was narrowly tailored to achieve a compelling governmental interest. We explained that such a determination was unnecessary because we had previously evaluated the same policy under RFRA. *Id.* at 901, 904 (citing *Diaz*, 114 F.3d at 73).

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[2] Defendants introduced similar evidence in this case. Furthermore, the Regional Director of the TDCJ explained that, because altercations between inmates occur with some frequency, the policy prevents inmates from "grab[bing] that handful of hair, [which] becomes a heck of a leverage issue. . . ."

Because RLUIPA and RFRA shared the least-restrictive-means, compelling-interest test, we held that the district court was not required to reexamine the TDCJ's hair length policy to conclude that Longoria had failed to state a claim under RLUIPA. *See id.* at 904. Consistent with these decisions, we affirm the dismissal of this RLUIPA claim.[3]

3. Colored Headband

To establish that the TDCJ's prohibition against colored headbands violates RLUIPA, Thunderhorse must first show that the prohibition substantially burdens his religious exercise. *See* 42 U.S.C. §§ 2000cc-1(a)-2000cc-2(b). The magistrate judge found that Thunderhorse failed to establish that wearing a white cloth headband, which the TDCJ allows, as

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[3] Thunderhorse argues that the policy cannot be the least restrictive way to maintain prison security because the TDCJ enforces it in an arbitrary manner and other prison systems, including the Federal Bureau of Prisons, permit long hair. He cites examples of how the TDCJ had previously permitted him and other inmates to have long hair. These contentions find support in *Warsoldier v. Woodford,* in which the Ninth Circuit issued a preliminary injunction, pursuant to RLUIPA, that prevented the California Department of Corrections from enforcing its hair length restriction against a Native American inmate. *See* 418 F.3d 989, 999-1001 (9th Cir.2005). The Ninth Circuit found that the restriction was not the least restrictive means to maintain prison security, in part, because the prisons run by the federal government, Oregon, Colorado, and Nevada all permit long hair or provide religious exemptions to their hair length restrictions. *See id.* at 999 (citations omitted). This court, however, is bound by *Diaz* and *Longoria.*

opposed to a colored headband, which the TDCJ prohibits, substantially burdens his religious exercise. We agree.

Thunderhorse's sole complaint on appeal is that he is unable to purchase the white headbands through the approved vendors or at the TDCJ's commissaries. He contends that this inability to purchase the white headbands, rather than the policy itself, is the substantial burden. At trial, he admitted that he cannot purchase the white headbands because the only remaining approved vendor mishandles his orders. In response, the Regional Director of the TDCJ promised to attempt to secure more vendors. Based on this evidence, the only fault that the magistrate judge could have attributed to the TDCJ is that it should have selected more competent vendors-an oversight that does not rise to the level of a RLUIPA violation. In sum, Thunderhorse has not shown that the TDCJ's headband policy substantially burdens his rights under RLUIPA.[4]

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[4] Thunderhorse does dispute the TDCJ's justification for the restriction against colored headbands, which the magistrate judge credited. According to the TDCJ, the restriction is the least restrictive way to prevent inmates from using colored accessories to promote gang affiliations. Thunderhorse, however, is in administrative segregation where he spends most of his time alone and in his cell. Neither the magistrate judge nor the TDCJ has explained how allowing him to wear a colored headband while he is alone and in his cell could promote gang violence. But we do not reach this question because Thunderhorse has failed to satisfy his threshold burden of establishing that the white-headband-only policy substantially burdens his religious exercise.

4. Performing Personal Pipe Ceremonies in His Cell

The TDCJ's ban on pipe use within the cell does not violate RLUIPA. Thunderhorse seeks to perform personal pipe ceremonies inside of his cell.[5] According to Thunderhorse, Native American Shamans use the pipe to pray. It is undisputed that the pipe ceremony is a religious exercise and that the prohibition on it is a substantial burden. Therefore, the issue is whether Defendants have shown that the prohibition on personal pipe use within the cell is the least restrictive method to achieve a compelling interest.

Defendants argue that the compelling interest here is prison security: no inmate may have materials inside of his cell that could be used to start a fire or create an explosive. The magistrate judge properly ruled for Defendants on this basis, stating that "[b]ecause Thunderhorse is in administrative segregation, he does not have access to pipe ceremonies for security reasons, which reasons represent compelling governmental interests."

Maintaining prison security is a compelling interest. *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 334 (5th Cir.2009) ("Texas obviously has

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[5] The TDCJ allows those in the general population (but not those in administrative segregation such as Thunderhorse) to participate in group pipe ceremonies outdoors. At trial, Thunderhorse made clear that he did not seek to attend those ceremonies. Instead, he only sought to perform personal pipe ceremonies inside of his cell.

compelling governmental interests in the security . . . of its prisons. . . ."). We find no reason to question the TDCJ's position that the prohibition on incendiary items within the cell is the least restrictive way to prevent inmates from starting fires in their cells. Hence, the TDCJ's prohibition on pipe use within the cell does not violate RLUIPA.

B. Request for a Jury Trial

Thunderhorse was not entitled to a jury trial because he sought only injunctive and declaratory relief. *See Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 193 (5th Cir.2008) ("[U]nless Congress has expressly provided to the contrary, an injunction is an equitable remedy that does not invoke a constitutional right to a jury trial." (citations omitted)); *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 423 n. 19 (5th Cir.1998) (citations omitted). At trial, when Thunderhorse raised this issue, the magistrate judge explained that "the reason it was a bench trial was because you were seeking injunctive relief and declaratory relief. That's equitable relief." Thunderhorse conceded, "Okay. I misunderstood." He did not claim that he sought any relief other than equitable relief. Under these circumstances, the magistrate judge properly denied Thunderhorse's request for a jury trial.

Thunderhorse apparently recognizes that he was not entitled to a jury trial, so he argues that, under Federal Rule of Civil Procedure 39(c), the court should have ordered one. Rule 39(c) is inapplicable. It states that "[i]n an action not triable of right by

jury, the court, on motion or on its own: (1) may try an issue with an advisory jury; or (2) may, with the parties' consent, try an issue by a jury whose verdict has the same effect as if a jury trial had been a matter of right. . . ." Fed.R.Civ.P. 39(c). Thunderhorse did not seek an advisory jury nor has he argued or pointed to any portion of the record showing that Defendants consented to a jury trial.

Thunderhorse also claims that he was entitled to a jury trial because, in his Complaints, he "left open the issue of damages depending on what verdict was returned by a jury." His Amended Complaint, however, does not seek, or reserve the right to seek, monetary damages. Instead, the "Prayer for Relief" only includes the following five requested remedies: (1) declaratory judgment, (2) injunctive relief, (3) costs of the suit, (4) attorney fees, and (5) other relief deemed proper by the court.

C. Request to Subpoena Witnesses

The magistrate judge did not err by denying Thunderhorse's request to subpoena two witnesses, Debra Liles and Chaplain Al O'Brien, to testify at trial. We review such decisions for an abuse of discretion. *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir.2004). "Before we will hold that the district court abused its discretion by refusing to issue a subpoena, the proponent of the subpoena must show that relevant testimony was excluded, or that a substantial need for a witness's trial testimony existed." *Id.* (footnote omitted). Thunderhorse argues that the magistrate judge should have compelled the

attendance of Liles and O'Brien because he considered them unnamed John and Jane Doe Defendants, and his Amended Complaint identified "all others similarly situated" as Defendants.

It appears that he raised this argument for the first time on the day of trial, and the record does not show that Thunderhorse has ever served or asked the court to serve Liles and O'Brien with the Summons and Complaint, *cf.* Fed.R.Civ.P. 4. As such, the magistrate judge properly denied his request to compel Liles and O'Brien to appear as Defendants.

Thunderhorse also mischaracterizes the proceedings before the magistrate judge on this issue by selectively quoting from her February 20, 2008 Order to Produce Witnesses. According to Thunderhorse, the Order stated, "'The State of Texas shall produce Debra Liles, Deacon Al O'Brien . . . [.]" But what the Order actually required was that the "State of Texas shall produce, Debra Liles, Reverend-Deacon Al O'Brien (*or provide last known address*). . . ." On March 17, 2008, Defendants complied: They informed the magistrate judge and Thunderhorse that Liles and O'Brien were no longer employed with the TDCJ and that they would not be available for trial. Defendants also provided Liles and O'Brien's last known addresses to the court under seal. Under these circumstances, we cannot find that the magistrate judge abused her discretion in denying Thunderhorse's request to subpoena these witnesses to testify.

D. Alleged Judicial Bias

During the trial, the magistrate judge stated that this court had already ruled that the TDCJ's grooming code, as applied to hair length, is enforceable under RLUIPA. She explained that Thunderhorse would have to argue the issue to this court because she was bound by our precedent. Thunderhorse argues that these statements, coupled with the magistrate judge's unwillingness to consider evidence that the hair length regulations violated RLUIPA, evinces judicial bias. Once again, Thunderhorse mischaracterizes what occurred. Contrary to Thunderhorse's argument, the record reflects that the magistrate judge allowed detailed testimony about the hair length code over Defendants' objections that the Fifth Circuit had already decided the issue. In sum, there is no merit to this claim of judicial bias.

E. Alleged Discovery Abuse

Thunderhorse alleges that Defendants' attorneys engaged in discovery abuse, such as failing to disclose documents and impeachment information, and informing Thunderhorse, just four days before trial, that Liles and O'Brien no longer worked for the TDCJ. According to Thunderhorse, "[t]hese tactics and elements of surpri[s]e etc. operated to cause Appellant, a disabled [*Pro Se*] litigant[,] extreme undue prejudice and constitutes misconduct by the [S]tate of Texas." We review alleged discovery errors for an abuse of discretion and will not reverse unless the party alleging the error establishes that he was

prejudiced by the error. See *United States v. Garcia*, 567 F.3d 721, 734 (5th Cir.2009); *Hastings v. North East Indep. Sch. Dist.*, 615 F.2d 628, 631 (5th Cir.1980).

We have already addressed the magistrate judge's denial of the motion to subpoena Liles and O'Brien. Thunderhorse's remaining allegations of misconduct also fail because he has not alleged that the magistrate judge made incorrect rulings or rulings that prejudiced him as a result of this alleged misconduct. Nor has he identified anything in the record showing that he objected to this conduct. Instead, his appellate papers focus exclusively on the "misconduct by the [S]tate of Texas." As such, these claims are not properly before the court as there are no decisions by the magistrate judge to review. *See Fagot Rodriguez v. Republic of Costa Rica*, 297 F.3d 1, 14 (1st Cir.2002) (finding no abuse of discretion where the plaintiffs did not object to the alleged discovery abuses).

F. Recognition of Native Americans as a Racial Category

Thunderhorse complains about the TDCJ's method for categorizing its inmates as either "White," "Black," "Hispanic," or "Other ." According to Thunderhorse, categorizing him as "Other" instead of "Native American" violates his Fourteenth Amendment rights by depriving him of "any legitimate rehabilitative, cultural programs, services and activities that could, should or would be available if such a category existed." Once again,

Thunderhorse has not pointed to any evidence to support this supposition. Nor have we found any in the appellate record. To the contrary, the Regional Director of the TDCJ testified that there are no benefits attached with these racial classifications. Hence, we find no clear error in the magistrate judge's decision to credit this uncontroverted testimony and to dismiss this claim.

G. Other Claims

Thunderhorse's remaining claims lack merit. First, he argues that the TDCJ favors white supremacist and multi-denominational faiths over traditionalist Native American Shamanism because the TDCJ does not have a "faith code" for Native American Shamanism. This argument overlooks the fact that he prevailed on this very issue before the magistrate judge who ordered that "Native American shamanism should be recognized as a legitimate faith, with its own faith code. . . ." Indeed, his brief recognizes that the magistrate judge's decision "give[s] Appellant the right to be recognized and categorized as a Native American Shaman with its own sub-code, with a choice of holy days and with special meals."

Second, Thunderhorse complains about the magistrate judge's ruling that he may have a ceremonial pipe, drum, clay flute, and medicine bundle when he is released from administrative segregation. He argues that this ruling creates an incentive for the TDCJ to keep him in administrative

segregation for as long as possible. This argument is entirely speculative and not ripe.

Third, during this appeal, Thunderhorse filed a Motion for Leave to File a Supplemental Brief, which we granted. In it, he contends that the TDCJ discriminates against his religion because he cannot obtain special foods for his holy days while Jewish, Muslim, and Catholic prisoners in administrative segregation can. The magistrate judge ruled on this matter in her Order Denying Plaintiff's Second Motion for Enforcement, dated July 21, 2009. She found that the religious meals that the Jewish, Muslim, and Catholic prisoners receive consist of the same foods provided to all inmates. She ruled that, consistent with the TDCJ's policy, if Thunderhorse wants food that the TDCJ does not serve so that he can celebrate religious holidays, he can arrange for outside sources to deliver the food through the prison chaplain. Thunderhorse does not challenge these rulings in his supplemental brief. Therefore, we do not address this claim.[6]

IV. CONCLUSION

For the reasons set forth above, we AFFIRM the judgment.

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[6] The remainder of the supplemental brief echoes prior requests for a pipe ceremony and an exemption to the hair length policy, which we have addressed.

APPENDIX B

IN THE UNITED STATES DISCTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

IRON THUNDERHORSE

v. Civil Action No. 9:04cv222

BILL PIERCE, ET AL.

MEMORANDUM OPINION

The Plaintiff Iron Thunderhorse, an inmate of the Texas Department of Criminal Justice, Correctional Institutions Division proceeding *pro se,* filed this lawsuit under *42 U.S.C. §1983* and other federal laws complaining of alleged violations of his constitutional rights. The lawsuit has been referred to the undersigned United States Magistrate Judge pursuant to *28 U.S.C. §636(c).*

The Allegations of the Complaint

Thunderhorse's original and amended complaints center around the issue of religious freedom. After an extensive discussion of his long history fighting TDCJ-CID in court, Thunderhorse explains that he is a practitioner of Native American religion and refers to himself as a "shaman." He states that the

Native American religious program existing in TDCJ-CID, as it now stands, gives preferential treatment to "Christian-oriented" Native American beliefs while "disfavoring and excluding" traditionalist Native American ceremonial leaders known as shamans. He says that the Native American program fails to inform interested persons, including himself, what the program entails and what items are allowed to be possessed before the interested inmate submits an I-60 inmate request form declaring a religious preference. Thunderhorse says that this is discriminatory because "mainstream Christians" are informed and know what to expect. Furthermore, he asserts, Native American programs within the prison are restricted to certain units, and inmates in administrative segregation are restricted from participating in the programs. Thunderhorse himself is in administrative segregation, as a result of a disciplinary case which he received for assaulting an officer.

Next, Thunderhorse says that the current TDCJ-CID policy setting out Native American "holy days" is not neutral, but favors Plains Indians culture and excludes other regions. He says that he requested a fair resolution in which one holy day for each of the seven cultural regions would be adopted, but that the Defendant Bill Pierce told him it was up to then-chaplain Ron Teel, and Teel said that only Pierce could approve it.

Thunderhorse reiterates that the restriction of Native American programs to only certain units violates the *Establishment Clause*. He stated that he

had been allowed a viable program while confined at the Stiles Unit, and to deny him one, at the Polunsky Unit, violates his right to practice his religion.

Thunderhorse goes on to say that TDCJ-CID "maintains a separate category" for shamanism, the practitioners of which are entitled to "nothing." He says that he is an "acknowledged shaman, equivalent to a priest and ceremonial leader," and that he has been listed as a shaman on his prison travel card since 1978, but that TDCJ-CID's failure to develop a set of shamans' items and procedures is proof that the prison system has tried to get him to convert to its "Christian-Indian program" or do without.

Although the TDCJ policy on religious devotional items claims the availability of such items as feathers, headbands, medicine bag, and natural objects such as stones, shells, feathers, bone, tooth, and plants, Thunderhorse says, this is not done in practice. He says that he used to have several multi-colored headbands, but that a new policy restricts these headbands to white only. Thunderhorse states that he asked for a copy of this new policy, but it has not been given to him. Thunderhorse contends that the Muslims are allowed to have multi-colored headgear, so the fact that he is not is discriminatory.

Thunderhorse states that medicine bags must come from an approved vendor. He says that this is "sacrilegious" because medicine bags are to be handled only by shamans and medicine men, not vendors. Thunderhorse adds that the allowance of

natural objects, kept in medicine bags, is left to the whims of unit wardens. He says that he had a quartz crystal in his medicine bag since the 1980s, but it was confiscated by Warden Alford who determined, by only visual inspection, that it was just "a hunk of plastic." Furthermore, Thunderhorse says, by policy medicine bags must be worn only in cells or to and from ceremonies, but that he wants to wear his medicine bag everywhere because "to remove it is to court death."

Thunderhorse complains that the TDCJ Religious Program Committee is staffed by Christian chaplains, and there are no Native American traditional elders or shamans on the committee. He states that the Native American program, which he again complains is located only on certain units, gets only occasional ceremonies, as opposed to "frequent services" for mainstream religions. He says that Shamans and Native American circle members are not allowed any feast days or celebrations, while mainstream religious groups have celebrations "on a weekly basis." He points to such things as Bill Glass Ministry Revivals, Mike Barber Ministry Revivals, and KAIROS celebrations, which present everything from magicians to singing groups, motorcycle displays, comedians, and martial arts exhibits, which he claims have "nothing to do" with religious issues. Thunderhorse says that he has formally suggested a plan allowing quarterly feast days celebrating the seasons, but to no avail.

Next, Thunderhorse says that Muslims, Orthodox Jews, and Orthodox Greeks in TDCJ are allowed

special diets and foods in conjunction with holy day observances, but no such privileges are allowed for Native Americans. He says that it is an "ancient tradition" to celebrate the four seasons with feasts including special foods. Thunderhorse's complaint does not identify the special diet or foods which he is seeking.

Thunderhorse says that he is the person most responsible for the existence of a Native American program in TDCJ-CID, but that he is excluded from the program because the defendants have refused to develop "a similar but unique category" for shamans, and because TDCJ has created a "Christian-oriented program" to the exclusion of traditionalist shamans such as himself. He says that he is a "traditionalist Algonquian shaman" and as such has sacred duties, obligations, and responsibilities to perform for his clan, nation, and confederacy, which he does not specify; in any event, Thunderhorse says, these duties have all been "chilled" since 2004. He says that the "shift" in TDCJ policies away from the three previous agreements which he says that he made with prison officials places a substantial burden on his "exercise of ancient traditions."

Between 2004 and 2005, Thunderhorse says, all of the sacred items allowed for him during the past decade have been confiscated or destroyed or forced to be sent home, due to "vague and ambiguous changes and interpretations" which served as "official excuses to discriminate and retaliate." He says that he has been subjected to acts of discrimination and retaliation, including: repeated

disciplinary cases for violating grooming standards; harm and threats of harm by use of tear gas; destruction of handicap aids such as glasses and UV shields; and placement in administrative segregation. He says that he has submitted several proposals for informal resolution, which were all ignored. He claims that he has suffered a denial of medical care and the discontinuance of medical passes.

Thunderhorse states that while some common intertribal beliefs do exist, a majority of Native American beliefs differ significantly between cultural regions. He says that mainstream Christian religions differ significantly on many issues, but that they are not forced to worship together en masse.

Thunderhorse adds that TDCJ-CID policies now in existence represent a departure from prior accommodations made to him in violation of various United Nations treaties, and also violate the treaty rights between the Algonquin Family of Nations as well as the International Indian Treaty Council's Declaration of the Spiritual Rights of Native American Prisoners. He says that he is a "direct descendant" of an autonomous confederation which "helped America establish its entire democratic political system."

Thunderhorse goes on to say that he has requested an exemption to the TDCJ-CID grooming code under RLUIPA and in consideration of previous out-of-court settlements. He says that he was never a security breach, even with long hair, because

visual searches were possible and were done, and because TDCJ-CID had multiple photographs of him on file. Thunderhorse argues that this distinguishes his case from Diaz v. Collins.

In summarizing his claims, Thunderhorse says that the key facts in his amended complaint are: (1) confiscation of religious items; (2) denial of religious items; (3) denial of programs for shamans; (4) denial of a racial category for "Native Americans"; (5) failure to provide exemptions or accommodations for the dress code and grooming code; (6) failure to allow equal access to services for inmates in segregation; and (7) failure to honor prior agreements which he entered into with prison officials. He adds that TDCJ-CID's grooming policy deprives him of a RLUIPA-approved hair style and says that the prison's racial categorization system recognizes only Caucasian, Hispanic, and Negro races, excluding Native Americans. He says that this deprives him of unspecified benefits he would otherwise have enjoyed.

The Trial Before the Court

Thunderhorse sought only injunctive relief, and so the case was set for trial before the Court, which was conducted on April 1, 2008. The trial proceedings commenced by the parties disputing about the exhibits being offered. While there was no question that many of the exhibits may have contained hearsay, the Court overruled the objections to the exhibits. Thunderhorse objected to the admission of a birth certificate, stating that it

was not his, but the Defendants contended that the birth certificate was relevant because Thunderhorse was complaining that TDCJ lacked a racial category for Native Americans, but that issue was "moot" because the birth certificate purports to show that he is not Native American. Thunderhorse's objection was overruled as well.

I. Iron Thunderhorse

The first witness called at trial was the Plaintiff Iron Thunderhorse. He testified that his birth name was William Coppola, but he had his name legally changed in 1989. He stated that he was unclear as to his age, although he believed himself to be 64 years old; he said that "federal documents" showed his birth date as 1944, but the birth certificate offered by the Defendants said 1950.[1]

Thunderhorse testified that his primary complaints concerned free exercise of religion, non-establishment of religion, and discrimination against Native Americans. He said that his lawsuit was brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA), and so he must show that the policies complained of imposed a "substantial burden." He stated that TDCJ's

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[1] Autobiographical details given by Thunderhorse about himself in his book, Return of the Thunderbeings (Bear & Co., Santa Fe NM, 1980) indicate that 1950 is the correct date; he refers to a motorcycle journey which he took "in the late '60s, at the age of 18." Return of the Thunderbeings, p. 13.

grooming policies imposed a substantial burden upon the exercise of his religious faith, and the Defendants pointed out that the Fifth Circuit had upheld these policies, to which Thunderhorse replied that those cases were decided prior to the passage of RLUIPA. He argued that the Texas prison officials could provide religious exemptions, observing that other prison systems, including the Federal Bureau of Prisons, do exactly that.

The Court pointed out that TDCJ does have programs for Native Americans, and Thunderhorse stated that a policy allowing inmates to perform religious activities in their cells is not a "program." He presented a copy of an inter-office communication from Chaplain O'Brien, showing that in 1995, while Thunderhorse was at the Stiles Unit, prison officials brought a ceremonial pipe to him and allowed him to conduct a ceremony. Thunderhorse stated that a box was brought to his cell containing a pipe, an abalone shell, and some herbs, and that this was done even while he was in administrative segregation.

Thunderhorse stated that during that time period, he was allowed to grow his hair while in segregation, although he had to cut it when he was released to general population. He was allowed to have a colored headband. After his hair was cut, he was allowed to keep his braids in the craft shop, and his property, including the braids, was sent to his wife when he was sent back to segregation. Thunderhorse stated that at that time, he had a number of items above and beyond the minimum required by the Native American program.

Thunderhorse said that his problems began when he was sent to the Polunsky Unit in August of 2004. He was not in segregation at that time. Thunderhorse stated that Warden Alford and Major Duff insulted him with childish name-calling at the Unit Classification Committee hearing after his arrival at the unit, and not long after that, his medicine bag was taken and a quartz crystal confiscated and destroyed. Thunderhorse said that the medicine bag had a buckeye, the crystal, and some herbs, white cedar and sage, in it. He explained that the crystal was two inches big and not sharpened, but that it was confiscated because the prison officials said that it was plastic; Thunderhorse questioned the relevance of this explanation, pointing out that the prison allows plastic rosary crosses.

Thunderhorse testified that a number of disabled inmates were transferred to the Polunsky Unit at about the same time that he was, and the unit was not ready for such an influx. He indicates that he received some disciplinary cases and was sent to 11 Building for pre-hearing detention, and his religious property was taken and sent to his wife; however, he was not given any confiscation papers.[2] His medicine bag was destroyed, however, and he talked to the chaplain and was allowed to get a new one, but could not get any quartz. This bag was later destroyed in 2006, along with a number of other items which

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[2] Thunderhorse stated that he spoke to Warden Alford, who talked to the captain and had the disciplinary charges dismissed.

Thunderhorse possessed. After this, Chaplain Rose brought him another medicine bag with a stone and some sage, and this is the bag he currently has.

While he was at the Wynne Unit, Thunderhorse stated, he was allowed to make his own ceremonial pipe and was able to do a morning and evening ceremony. He said that this was part of an agreement which he had with Wayne Scott, the former Director of TDCJ-CID, and Debbie Lyles. Under this agreement, Thunderhorse said, he cut his hair, and was allowed to keep the cut hair and to perform his pipe ceremonies. He kept these privileges at the Stiles Unit, but lost them when he went to the Polunsky Unit. Thunderhorse maintained that he never violated the agreement or abused the privileges which he received in any way. He said that he has pictures of himself while in prison, with long hair and a beard.

When asked by the Court what he wanted from the lawsuit, Thunderhorse said that TDCJ has 32 "faith codes," of which half are Christian. Native Americans have one, which he said means "practice our way or else." He said that he wants a code for shamanism, access to a musical instrument (a drum or flute), a colored headband, and a access to a pipe. Thunderhorse stated that while Native Americans are allowed only white headbands, because TDCJ officials say that they are concerned about prisoners using colored headbands as gang symbols, other religious faiths are allowed multi-colored robes or bandannas with white and blue trim. Thunderhorse also complained that three of the four holidays

allocated to Native Americans are "battle days" rather than true holy days, and said that he wants to celebrate the seasons, something that other religious faiths do. He also stated that he wanted feast days. For these feasts, Thunderhorse said that fish and wildlife would be preferable, but he would not wish to place a burden on the kitchen, and so chicken could be substituted for wild turkey.

Thunderhorse said that he knows of two other inmates who have submitted requests to be classified as Native American shamanists, but they were refused. He estimated that one-fourth of all inmates who identify their religious preference as Native American would want to be shamanists. He said that Bill Pierce claimed that some inmates designate their religious faith as Native American just to get to smoke, but Thunderhorse said that this was incorrect because cigarettes are readily available, albeit unlawfully, within the prison.

Thunderhorse again referred to the prison faith code, pointing out that a religious faith calling itself the "Church of Jesus Christ Christian-Aryan" was recognized and asking why shamanism could not also be recognized. He says that according to Pierce, TDCJ has gone from 36 recognized faiths to 136, but it is not clear what the additional 100 are; in any event, Thunderhorse says, there is not one for shamanism.

As for the issue of his ethnicity, Thunderhorse said that there are Native Americans who neither practice the religion nor speak the language. He

complained that he cannot have a pipe or a colored headband, although he does have a bottle of white sage. Thunderhorse said that TDCJ had four vendors of Native American supplies, but three are now defunct and the other one repeatedly gets orders wrong. He says that prison officials want him to use the sage in a "smokeless ceremony."

On cross-examination, the Defendants referred to an organization called the Algonquian Confederacy of the Quinnipiac Tribal Council (ACQTC). Thunderhorse explained that this was a non-profit organization chartered in the State of Connecticut, and said that it was a "business council," not a religious one. He acknowledged that he had written virtually all of the information on the ACQTC website and that the address for its headquarters was his wife's home. Thunderhorse said that his wife was the chief financial officer for ACQTC and that he was the "grand sachem" (chief), as well as a historian and linguist.

When asked how he was harmed by lack of recognition for shamanism in the TDCJ faith code, Thunderhorse explained that because shamanists are not recognized, they are not allowed to have certain items, including personal pipes, colored headbands, other shamanistic items such as drums or flutes, and appropriate holy days with feast days. He said that Native Americans do not have "authoritative sources" spelling out the practice of their faith, and explained that not all Native Americans practice the same—there are seven regions with seven linguistic branches,

Thunderhorse conceded that the Indian t ibe in which he claims membership, which he identifies as the Quinnipiac Indians, is not a federally recognized tribe as of yet, although he says that the application form seeking federal recognition has been submitted.

Returning to the issue of the birth certificate, the Defendants note that one of Thunderhorse's purported certificates lists his mother as an Indian, while the other lists her as "white." Thunderhorse said that someone else had submitted one of the questioned certificates under his name and said that "this is a problem that he has gone through." He testified that "he did not know what year he was born."

II. Steve Young

The second witness called was inmate Steve Young, a former cellmate. Young said that he was familiar with Thunderhorse's religion as Native American Shamanism and that he has discussed this religion with Thunderhorse, although he, Young, was not a shamanist. He said that he had seen Thunderhorse with a medicine bag, long hair, and a bandanna, and stated that as far he knew, there was no Native American policy at TDCJ; he also stated that he had helped Thunderhorse, who has vision problems, get around, and that Thunderhorse was one of the first inmates interviewed by Special Master Vince Nathan as part of the Ruiz case.

Iii. Dennis Collins

Collins testified that he had been in inmate in TDCJ for about six and a half years. He said that he lived in the same section as Thunderhorse and had talked to Thunderhorse about his faith. Collins said that he tried to change his own faith to Native American Shamanism, but was told that he would have to be "Native American Christian.' He filed a grievance about this, but it was never returned to him.

Collins stated that he received an inter-office communication from Chaplain Rose referring to "Native American Christian." However, as the Court pointed out, the document did not make clear that the word "Christian" went with the words "Native American," or was just typed in proximity to them.

IV. Sidney Byrd

Byrd testified that he had been in prison since 1999 and had never been housed on the same unit with Thunderhorse; however, he said that he knew of Thunderhorse through the "struggle for religious freedom." Byrd stated that he himself is a Native American spiritualist, a Cherokee, and that he was not raised on a reservation but has known about Native American religion all of his life. He said that he has never written to Thunderhorse, but that Thunderhorse has written to him.

Byrd stated that he has tried to practice Native American religion during the entire time he has been in prison, but has been unable to do so. He said that he is familiar with "Native American shamanism,"

saying that this refers to "traditional practices." He added that Chaplain Teel had written to him about Thunderhorse, using "racial epithets."

Byrd noted that he is now in administrative segregation and said that there is no program for Native Americans, possibly referring to those inmates also confined in segregation. Byrd had his hair up, but let it down to show the Court that it was well past his collar. He explained that he received a "religious exemption" from the assistant warden at the unit where he is confined. On cross-examination, Byrd acknowledged that he had received a disciplinary case for failure to groom, but offered the opinion that counsel for the Defendants in this case had something to do with this fact. He also pointed out that he had obviously been growing his hair for a considerable period of time for it to have reached that length.

V. Ruth Thunderhorse

The plaintiff's wife Ruth Mahweeyeuh Thunderhorse testified that she has known him since 1994 and has been married since 2002. She said that she has never been arrested and has never been in trouble with the law, and that she used to be a Christian missionary.

At present, she said, she serves as the chief financial officer for ACQTC. In 2005, she filed a letter of intent with the Bureau of Indian Affairs, seeking recognition for the Quinnipiac Indians.

Ruth Thunderhorse stated that she visited the Plaintiff at the Stiles Unit, at a time when he was not in administrative segregation. When he was placed in segregation, his property was taken and sent to her. This property included religious items, and Ruth said that the chaplain at the Stiles Unit had the religious items sent to him so that they could be returned to Thunderhorse.

Ruth testified that she had written a biography of Thunderhorse, which was published in 2007.[3] She stated that she had not been raised in the Indian culture, but had been told that she was part-Indian, although her family "hid" it. She did not begin exploring her own native roots until moving to Arizona. Ruth said that she was editing a magazine for which Thunderhorse had written an article, which is how she met him.

VII. [sic] Ron Teel

Teel, a named Defendant in this lawsuit, testified that he was hired by TDCJ in 1998 and terminated in 2005. He originally filed a *pro se* answer in the case saying that he was not the TDCJ Native American coordinator, but the answer filed on his behalf by the Attorney General said that he was.

Teel stated that he has Native American (Cherokee) ancestry himself, although he did not

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[3] *See* Ruth Thunderhorse, Following the Footprints of a Stone Giant—the Life and Times of Iron Thunderhorse (Infinity Publishing Co., West Conshohocken PA, 2007).

belong to any Cherokee organizations. Thunderhorse offered into evidence a letter which Teel had written to Byrd, in which Teel referred to Thunderhorse as a "wanna-be" and a "crybaby." Thunderhorse also offered a card which Teel had sent to him, wishing him a happy Thanksgiving and Columbus Day and saying "we think Italians rock." Thunderhorse stated that he considered the card an insult, because in his view, Thanksgiving and Columbus Day are offensive to Native Americans and because the reference to Italians possibly related to the fact that Thunderhorse's father was Italian and not Indian.[4]

Teel testified that Native American ceremonies within the prison were set up by the Religious Practices Committee, and that he did not know who this committee consisted of. He explained that when he was hired in 1998, the Native American directives were already in place. Teel stated that he had received training from a pipe carrier named Two Bears, from the Pequod tribe, who taught him ways of carrying out ceremonies.

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[4] As noted in the discussion concerning Thunderhorse's birth certificate, some prison officials hold the view that Thunderhorse does not have Native American ancestry. A letter in Thunderhorse's parole file (Defendants' Exhibit No. 8) from an individual named Daniel Whitman, says that Thunderhorse is not a Native American; this letter also says that Thunderhorse was born in Italy and came to the United States at age five, which does not appear to comport with the birth certificate which says that he was born in New Haven, Connecticut. This question is not relevant to any issue in the lawsuit and so the Court does not purport to resolve it.

Thunderhorse stated that he had written Teel a letter about ceremonial items, and that Teel had responded that Thunderhorse should "get out and start his own circle." Thunderhorse referred to a case called Yellowquill v. Scott, in which an individual named Jolene Yellowquill was allowed, as part of a settlement, to have a personal pipe.[5]

VIII. Bill Pierce

Pierce testified that he was now the Director of Chaplaincy Operations at TDCJ, and he had been a regional chaplain before that. He said that the director's position was an administrative and supervisory one, and that the majority of policies being administered were in effect in 2002. Pierce stated that TDCJ had a "Religious Practices Committee" with representatives from different backgrounds, but he did not know if any of the members had a Native American background.

Pierce testified that he was familiar with the faith codes used by TDCJ, explaining that these codes were not for recognition but simply for record-keeping purposes. He acknowledged that there was only one faith code for Native Americans.

A number of the codes were for various Christian denominations, and so Thunderhorse asked Pierce why half of the codes were for Christian groups but he could not add one more for Native American

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[5] *See Yellowquill v. Scott, et al.*, civil action no. 4:95cv1080 (S.D.Tex.). The precise terms of the settlement do not appear on the docket or in the order of dismissal.

shamanism. He also asked about the Church of Jesus Christ Christian-Aryan. Pierce stated that if 15 people wanted a church, they could have one, but that Thunderhorse was the only inmate wanting Native American shamanism. Thunderhorse said that requests had been sent to Pierce, apparently from other prisoners, wanting Native American shamanism, but these were returned with the word "shamanism" crossed out; Pierce said that he had not done this but that someone else must have.

Pierce stated that Thunderhorse could be listed as "Native American shamanist" on his travel card, but that in the chaplain's office, he would be listed only as "Native American." When asked why shamanism could not be included within Native American, Pierce stated that this had been done, but Thunderhorse said that he had received no accommodations. Thunderhorse explained that he wanted a hand drum or a whistle, but Pierce said that he had not received any request like that from him. Thunderhorse insisted that he had sent three separate requests for Pierce for such items.

Documents were introduced into evidence, including a 2005 letter from Thunderhorse to Pierce that Pierce said he referred to the Attorney General because this lawsuit was pending, a letter from one chaplain to another in 1998 concerning Thunderhorse's shamanism, and a letter from 1995 from a chaplain saying that Thunderhorse had carried out a pipe ceremony without incident.

Thunderhorse contended that this last letter was proof that an agreement had existed at one time allowing him to perform pipe ceremonies. Pierce said that he had nothing to do with any such agreement, and that he did not know if the letter showed the existence of an actual agreement or not.

Pierce conceded that Native American pow-wow ceremonies were done in other prisons. He said that TDCJ had two Native American contract chaplains and that he had tried to contact tribes for assistance, but received no response. Although Thunderhorse maintained that there were only four vendors of Native American supplies, Pierce said that there were more than that.

After a lengthy discussion of grooming codes, Thunderhorse returned to the question of the TDCJ faith codes. Pierce said that at one time, there were 36 faith codes for different religious faiths, but now there are 135. He explained that this increase occurred because more inmates were claiming to be members of different faiths.

Pierce went on to say that headbands were required to be of white cloth or natural leather. Thunderhorse asserted that Muslims get multi-colored headgear, and Pierce said that this was not true, or that it should not be true if it was. At one time, there were 302 inmates in TDCJ claiming to be adherents of Native American religions, but now there are about 3400.

With regard to pipe ceremonies, Pierce noted that tobacco is banned in prison except for the permitted Native American pipe ceremonies. He said that inmates must be participating in the unit's Native American circle in order to partake of the pipe ceremony. These ceremonies are done at 13 or 14 units, and all but one are managed by chaplains. He noted that Native Americans were the only inmates allowed to do things forbidden by policy; they could use tobacco in their pipe ceremonies, but Catholics could not use wine.

As to the question of holy days, Pierce said that prison officials go to outside resources, including persons who are leaders in their respective faiths. He said that holy days in prison often mean a day off and possibly the chance to gather together, as Muslims do in celebration of Ramadan, but that inmates in administrative segregation are not permitted to do so. He pointed out that inmates can request the designation of holy days, and the request will go to the Religious Practices Committee. Thunderhorse complained that the Committee was made up of "mainstream Christians," and Pierce stated that there are two Native American chaplains and five Muslim chaplains. He pointed out that there are "generic" worship services at which members of different Christian denominations worship together, and the members of the various sects of Islam and Judaism worship together.

Pierce stated that there are no feast days for Christians, asserting that Christmas is not a religious meal. The Muslims get two feast days per

year, and special food is brought in from outside. The question of kosher food for Jewish inmates is currently in litigation. He said that sometimes inmates lead services, but only with volunteers present.

Thunderhorse contended that Christian evangelists such as Mike Barber and Bill Glass are allowed to bring special programs into the prison. He said that a Christian group called Kairos gives out cookies to inmates, even in segregation, and asked if a group is allowed to distribute cookies, why could a group not help inmates perform pipe ceremonies? Pierce replied that the prison did not tell volunteers what to do.

Thunderhorse again pointed to the Federal Bureau of Prison policies concerning Native American inmates, stating that under these policies, inmates in segregation could have pipe ceremonies and sweat lodges were allowed. Pierce said that under TDCJ rules, sweat lodges are not permitted, but pipe ceremonies are allowed on certain units. He added that some Native Americans refuse to go to pipe ceremonies because of a perception that there are "fakers" there, and Thunderhorse acknowledged that this was true. Pierce stated that TDCJ had less funding than the Federal Bureau of Prisons, as well as a shortage of officers.

Pierce stated that Thunderhorse could get a spiritual advisor to come visit him every month, and that all inmates had to be treated equally. He said that as far as he knows, Thunderhorse is the only

inmate claiming a faith of Native American shamanism, to which Thunderhorse replied that he was the only one pushing it, and that no other inmates knew that this faith was available.

IX. Daniel Rose

Thunderhorse said that Daniel Rose used to be the chaplain at the Polunsky Unit, and that Rose had put "Native American shamanist" on Thunderhorse's travel card.[6] Rose also gave Thunderhorse a medicine bag, but Thunderhorse wanted a flute, which had been rejected by the warden, and a turtle shell. Rose said that Thunderhorse did try to follow the rules, but the vendor made a mistake.

Rose said that Thunderhorse was the only person who had requested "Native American shamanism" as his faith. He said that Thunderhorse's faith had been listed as "Native American" because there was no code for Native American shamanism, and that if Thunderhorse had insisted on Native American shamanism for his faith, it would have show· up on the computer as "other." Consequently, Rose said, he listed Thunderhorse's faith as "Native American" so that Thunderhorse could have a medicine bag.

X. William Stephens

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[6] Thunderhorse's current travel card reflects "Native American Shamanism" as his faith.

The final witness called at trial was William Stephens, the Region II Director. Thunderhorse read the TDCJ grooming code into the record, and Stephens conceded that he did not know of any inmates receiving cases for not showering or brushing their teeth. Thunderhorse argued based on this that only "certain portions" of the grooming code (i.e. those relating to hair) were enforced; however, he acknowledged that he knew of instances in which inmates had been compelled to shower.

Thunderhorse said that there was an exemption to the grooming code, relating to medical issues—if inmates have a skin issue, they can wear beards. He pointed out that TDCJ had multiple photographs of his and could identify him even if he cut his hair, but Stephens indicated that inmates could drastically change their appearances by cutting long hair or shaving off beards.

The Court asked Stephens about Byrd, who clearly had long hair. Stephens stated that TDCJ had a shortage of about 3500 officers, and so some matters were overlooked. He pointed out that Byrd "looked like a different person" when he let his hair down, and said that when an inmate name Carlos Kidd escaped, he was recaptured because of a photograph which the prison had put out.

Stephens said that inmates in administrative segregation could not go to pipe ceremonies, but Thunderhorse contended that he was not asking to go to a ceremony but to have them done in his cell. Stephens said that TDCJ policy prohibited this

because of complaints by other inmates, fire safety concerns, and the fact of having yet one more item to search. He said that Thunderhorse could not have a ceremony outside because two guards would have to escort him, and the Coffield Unit alone had a shortage of 270 officers. In addition, he stated that some inmates would try to manipulate the system to obtain combustible items.

Stephens testified that a balance had to be struck between religious beliefs and security issues. He explained that items must be ordered from approved vendors because of contraband concerns. Thunderhorse replied that the problem was one of availability, and Stephens said that this concern could be brought up with the Religious Practices Committee or through Pierce, the director of the chaplaincy program. Stephens noted that colored headbands represented a problem because gangs use colors to show affiliations, and that Thunderhorse could not be allowed to have a pipe ceremony in his cell because other inmates would want to be able to smoke in their cells too.

Stephens said that passing out cookies was different from holding religious ceremonies because of staffing and safety concerns. He said that whistles, drums or flutes could be made into weapons. In addition, he said, the prison was already noisy, and such items can be made into weapons. Stephens added that there would be no "automatic benefits" from creating a category for Native American shamanism, nor from creating a racial category for Native Americans.

Thunderhorse described the flute as being 12 inches of bamboo, which can be crushed with one hand. He said that a pencil was more dangerous than the flute. Stephens said that a flute could be made into a blow gun, which Thunderhorse disputed on the ground that a blow gun is longer.

Thunderhorse stated that he had various documents giving his ethnicity as white, Native American, Indian, and "other," but Stephens again said that there were no advantages to creating a racial category of Native American. After finishing this line of questioning, the parties announced that there was no further evidence to offer at trial.

Legal Standards and Analysis

This Court has previously expounded upon the central importance of religion in this country's history. *Diaz v. Collins*, 872 F.Supp. 353, 356-57 (E.D.Tex. 1994), *aff'd* 114 F.3d 69 (5th Cir. 1997) (citing the 1786 Virginia Statute of Religious Liberty, James Madison's 1785 Memorial and Remonstrance on Religious Liberty, the 1776 *Virginia Bill of Rights*, the 1780 *Massachusetts Bill of Rights*, and the Northwest Ordinance of 1787).

The current law is codified in the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §2000cc. This law provides that no state or local government shall impose a substantial burden upon a person residing in or confined to an institution unless the government

shows that the burden furthers a compelling governmental interest and does so by the least restrictive means. This standard was carried over from RFRA, but Congress noted that courts entertaining complaints under RLUIPA would accord "due deference to the experience and expertise of prison and jail administrators." 146 Cong. Rec. S7775 (joint statement of Sen. Hatch and Sen. Kennedy, July 27, 2000).

There are five cases which must be discussed with regard to the applicable legal standards. These are: *Cutter v. Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005); *Longoria v. Dretke*, 507 F.3d 898 (5th Cir. 2007); *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004); *Freeman v. TDCJ-CID*, 369 F.3d 854 (2004); and *Diaz v. Collins*, 114 F.3d 69 (5th Cir. 1997). In *Cutter*, members of various "non-mainstream" religions in the Ohio prison system brought suit under RLUIPA complaining that the prison officials failed to accommodate their religious exercises in various ways, including denying them access to religious literature, denying the same opportunities for group worship enjoyed by adherents of mainstream religious, forbidding them to adhere to dress and grooming requirements, withholding ceremonial objects substantially identical to those permitted to adherents of mainstream religions, and failing to provide chaplains trained in their faith.

In response, the prison officials mounted a facial challenge to RLUIPA, arguing *inter alia* that RLUIPA improperly advances religion in violation of the Establishment Clause. The district court denied

the defendants' motion to dismiss, but the Sixth Circuit reversed this decision, holding that RLUIPA violated the Establishment Clause by giving "greater protection to religious rights than to other constitutionally protected rights." This decision was in turn reversed by the Supreme Court.

The Supreme Court began by tracing the history of congressional efforts to accord religious exercise heightened protection from government-imposed burdens. Congress responded to the Court's decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990) by enacting the Religious Freedom Restoration Act (RFRA) of 1993. The Court invalidated this law in *City of Boerne v. Flores*, 521 U.S. 507 (1997). Congress then enacted the Religious Land Use and Institutionalized Persons Act. This law provides that no state or local government shall impose a substantial burden upon a person residing in or confined to an institution unless the government shows that the burden furthers a compelling governmental interest and does so by the least restrictive means. This standard was carried over from RFRA, but Congress noted that courts entertaining complaints under RLUIPA would accord "due deference to the experience and expertise of prison and jail administrators." 146 Cong. Rec. S7775 (joint statement of Sen. Hatch and Sen. Kennedy, July 27, 2000).

In rejecting the Sixth Circuit's conclusion, the Supreme Court said first that RLUIPA is consistent with the Establishment Clause because it "alleviates exceptional government-created burdens on private

religious exercise." *Cutter*, 125 S.Ct. at 2118. The Court noted that individuals in institutions are dependent upon the government's permission and accommodation for exercise of their faith.

However, the Court then stated that "we do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety." The Court explained that while the Act adopts a "compelling governmental interest" standard, "context matters" in the application of this standard. The Supreme Court said that lawmakers supporting RLUIPA were "mindful of the urgency of discipline, order, safety, and security in penal institutions," quoting Sen. Hatch, and said that these lawmakers anticipated that courts would apply the Act's standard with "due deference to the expertise and experience of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline, consistent with consideration of cost and limited resources." *Cutter*, 125 S.Ct. at 2123.

Finally, the Court concluded that should inmate requests for religious accommodations become excessive, impose unjustified burdens upon other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition. *Cutter*, 125 S.Ct. at 2125.

In *Longoria*, the plaintiff Juan Longoria, an inmate of Mexican and Native American descent, requested permission to grow his hair because the

Great Spirit told him not to mutilate his hair. He advised prison officials that he would not cut his hair due to his religious beliefs, and was told that an exemption could not be authorized for him under the grooming policy. Longoria received disciplinary action for refusing to cut his hair. He sued under RLUIPA, and the district court dismissed the lawsuit as frivolous, and the Fifth Circuit affirmed.

In *Adkins v. Kaspar*, inmate Donald Adkins was a member of a church called the Yahweh Evangelical Assembly. He complained that he was not permitted to observe particular days of rest and worship, each Saturday for the Sabbath and certain holy days during the year. A hearing pursuant to *Flowers v. Phelps*, 956 F.2d 488, *modified in part on other grounds*, 964 F.2d 400 (5th Cir. 1992), was conducted by the district court.

At the hearing, YEA elder Jerry Healan testified that the church required adherents to meet together on each Sabbath and to make particular observances on specific holy days. He said that he went to the prison unit approximately once a month to oversee Sabbath services, but that the distances involved made more frequent trips impracticable. Healan stated that 25 to 30 inmates at Coffield attended the services. Healan stated that he and Adkins corresponded regularly and that Adkins had authored several articles which were published in the YEA newsletter and on the Internet. Healan also said that he had been allowed to come to Coffield and conduct a baptismal ceremony for Adkins and other inmates.

Adkins testified that he had been granted lay-ins for holy days and the Sabbath, but that he and other YEA members could not assemble and hold services on their own. He stated that he and other YEA members had been allowed to attend tape sessions and listen to tapes sent by Healan, but that they could only do this on Mondays; tape sessions could not be conducted on Saturdays unless an accredited religious volunteer was present.

Leonard Sanchez, the senior chaplain at the Coffield Unit, testified that YEA members could congregate on the Sabbath if Healan was present (Healan was the only accredited volunteer for YEA), and that if Healan could come more frequently, arrangements would be made for YEA members to congregate, conditioned on availability of space and time. Another couple, the McEnanys, had not yet been accredited as YEA volunteers, but Sanchez said that when they were, they could lead YEA services on their own.

The district court concluded that the defendants had not denied Adkins a reasonable opportunity to practice his religion and that they had not burdened his religious exercise in violation of RLUIPA. On appeal, the Fifth Circuit first examined Adkins' claim that TDCJ policies violated his right to free exercise of religion.

The Court reviewed the test of *Turner v. Safley*, 482 U.S. 78 (1987). This case established a four-factor "rational relationship" test for analyzing the constitutionality of regulations that burden a

prisoner's fundamental rights. Under this test, courts must consider (1) whether a valid, rational connection exists between the prison regulations and the legitimate governmental interest put forth to justify it, (2) whether there exist alternative means of exercising the fundamental right which remain open to prison inmates, (3) what impact accommodation of the asserted constitutional right would have on guards and other inmates, and on the allocation of prison resources generally, and (4) whether there is an absence of ready alternatives to the regulation in question. *Adkins*, 393 F.3d at 564.

The Fifth Circuit noted that TDCJ's religious accommodation policy had been held to be rationally related to legitimate government objectives in *Freeman v. TDCJ*, 369 F.3d 854 (5th Cir. 2004). In reviewing the second prong of the *Turner* test, the Fifth Circuit stated that the pertinent question is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates opportunities to exercise their faith. In this regard, the Fifth Circuit stated that Adkins had access to religious materials, he and other YEA inmates were not required to work on the Sabbath, video and audio tapes were made available to YEA inmates on Mondays, and YEA members were permitted to hold services when Healan was able to attend. The Fifth Circuit concluded that these accommodations were sufficient to accord Adkins and other YEA members alternative means to exercise their faith.

Next, the Fifth Circuit turned to the question of the impact which accommodation would have on guards, other inmates, and the allocation of resources generally. The approximately 25 active members of YEA represented less than one percent of the population at the Coffield Unit; requiring the defendants to accommodate every religious holiday and requirement of the YEA, regardless of the availability of volunteers, space, or time, could "spawn a cottage industry of litigation" and have a negative impact on prison staff, inmates, and resources. In addition, the Fifth Circuit said, if YEA were accommodated but other small religious groups were not, a perception of favoritism could arise which would have a negative impact on prison discipline and morale.

The Court concluded the discussion of Adkins' free exercise claim by stating that there was no obvious, easy alternative which would accommodate both Adkins' and TDCJ's needs. Adkins' request, that YEA members be allowed to congregate on all Sabbaths and holy days without regard for the availability of qualified volunteers or adequate space and security was not an alternative which accommodated the prisoner's rights at *de minimis* cost to legitimate prison interests, and the chaplain testified that the Assembly could meet more often if volunteers could be present and time and space were available.

The Fifth Circuit then addressed Adkins' equal protection claim, saying first that the Constitution does not require that every religious group in prison,

however small in number, have identical facilities or personnel. The Court stated that every religious group at Coffield, except for Muslims who have a separate court order, must have outside volunteers present for meetings. Hence, Adkins had failed to show any equal protection violation.

Adkins also complained that TDCJ's policies violated RLUIPA. The Fifth Circuit held that in RLUIPA claims, the plaintiff first has the burden of demonstrating that the governmental practice imposes a "substantial burden" on his religious exercises. This requires the court to answer two questions: (1) is the burdened activity a "religious exercise," and (2) if so, whether the burden is "substantial."

The Fifth Circuit acknowledged that the term "religious exercise" in RLUIPA means any exercise of religion, whether or not compelled by or central to a system of religious belief. The exercise alleged to be burdened, which was the YEA Sabbath and holy day gatherings, was clearly a "religious exercise" under this definition, requiring review of the second question, whether or not the burden was "substantial."

In answering this question, the Fifth Circuit first noted that the term "substantial burden" was not defined in the statute, and different circuits had defined the term differently. After reviewing the definitions adopted by the Seventh, Eighth, Ninth, and Eleventh Circuits, as well as pertinent Supreme

Court decisions, the Fifth Circuit concluded that the proper definition was as follows:

> [F]or purposes of applying the RLUIPA in this circuit, a governmental action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly modify his religious beliefs.
>
> And, in line with the foregoing teachings of the Supreme Court, the effect of a government action or regulation is significant when it either (1) influences the adherent to act in a way that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available non-trivial benefit, and, on the other hand, following his religious beliefs.
>
> On the opposite end of the spectrum, however, a government action or regulation does not rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed.

Adkins, 393 F.3d at 569-70. The Court again emphasized that no test may require that the religious exercise be central to the adherent's belief system; however, the Court said, "the Supreme Court's express disapproval of any test that would require a court to divine the centrality of a religious

belief does not relieve a complaining adherent of the burden of demonstrating the honesty and accuracy of his contention that the religious practice at issue is important to the free exercise of his religion." In applying this test to Adkins, the Court said that the requirement that an outside volunteer lead worship services does not place a substantial burden upon Adkins' religious exercise, and therefore did not violate RLUIPA. *Adkins*, 393 F.3d at 571.

In *Freeman v. TDCJ*, the plaintiff William Freeman joined the Church of Christ while in confinement at the Price Daniel Unit. A chaplain named Wayne Horton, a Church of Christ Member, was assigned to that unit, but Freeman said that Horton's teachings departed from established Church of Christ doctrine. Freeman filed a grievance complaining about Horton's performance and about a decision to reduce the two-hour Church of Christ services to an hour and a half. This grievance asked that elders from a local Church of Christ congregation oversee services, that incarcerated members be permitted to conduct services without Horton's interference, and that the services be restored to two hours. This grievance was denied but the dispute continued, culminating in a walk-out by some 50 inmates from a service, for which Freeman received a disciplinary case and was transferred to a high-security unit.

Freeman filed a lawsuit and a class was certified. This lawsuit complained that TDCJ was denying Church of Christ members an adequate opportunity to practice their faith. The lawsuit sought an

injunction ordering TDCJ to recognize the Church of Christ as a Christian religion separate and apart from other faiths, enjoin prison officials from violating Church of Christ members' right to worship, order prison officials to allow Church of Christ members to have an hour of separate worship time each Sunday according to tenets which the members believed essential to salvation, including a cappella singing and communion, order TDCJ officials to allow Church of Christ ministers and teachers from outside the prison to conduct individual Bible studies or assist with religious services, and order prison officials to allow these outside ministers and teachers to perform baptism by full immersion at an inmate's request. Freeman also claimed that he individually was the victim of retaliation.

The evidence showed that TDCJ provides weekly religious services for what it considered to be the five major faith sub-groups within the prison. These are Roman Catholic, Christian non-Catholic, Jewish, Muslim, and Native American. The Church of Christ falls within the Christian non-Roman Catholic sub-group.

In addition, the evidence showed that supplemental devotional opportunities are offered for Church of Christ members. In 41 TDCJ units, worship services are conducted by volunteers, who can often tailor the services to include a capella singing and communion; immersion baptism can be arranged for and performed by a Church of Christ minister at an inmate's request; and inmates may

meet with an approved spiritual advisor twice a month.

The Fifth Circuit, applying the Turner test, concluded that TDCJ's policy was content-neutral and was rationally related to legitimate governmental objectives. Specifically, the Court stated that staff and space limitations, as well as financial burdens, are valid penological interests. The division of worship services into five major subgroups was "eminently reasonable," and Church of Christ inmates also had alternative means to exercise their beliefs. The Fifth Circuit rejected the view that if TDCJ offered Church of Christ services in 41 units, it must offer such services in all units, and also rejected the equal protection argument set out by the plaintiff class.

Finally, the Fifth Circuit rejected Freeman's retaliation claim, noting that Freeman had engaged in a public rebuke of Chaplain Horton and incited a walkout, which behavior was inconsistent with his status as a prisoner; consequently, punishment imposed for that behavior was not unconstitutional retaliation.

In *Diaz v. Collins*, the Fifth Circuit reviewed a case from the Eastern District of Texas decided in 1994. The plaintiff Felipe Diaz expressed himself as a follower of Native American beliefs and said that he wished to worship in traditional ways, including the use of pipes, the keeping of a medicine pouch, a headband, and the wearing of long hair. The district court observed that in April of 1994, TDCJ had

instituted a new policy specifically addressing the needs of Native American adherents in the prison. Under this directive, the Native American adherents could possess a headband, a shell, a medicine pouch, seven sacred stones, a feather, and such other objects as may be permitted by the unit warden and unit chaplain. The inmates had access to ceremonial items such as drums, pipes, tobacco, a gourd, sage, sweetgrass, and cedar, which were made available to them by the chaplain as required. The regulations stipulated that items must be ordered from approved vendors, but stipulated that the medicine pouch could not be touched by any other person although it could only be worn in the cell.

The district court, after sketching the history of religious freedom in America, reviewed the Religious Freedom Restoration Act, the law in effect at that time. The district court applied the Act to each of Diaz's claims in turn.

In so doing, the district court concluded first that TDCJ's hair regulations served the compelling governmental interest of security and were the least restrictive means available to further this interest. Although Diaz complained that his religious beliefs did not allow him to obtain a medicine pouch from a commercial vendor, the evidence at trial showed that he would be permitted to obtain such a pouch from his spiritual advisor, but that the pouch had to be sent through the warden's office and that Diaz had to allow it to be visually inspected for contraband. The district court concluded that these regulations, as well as the rule that Diaz could wear the pouch

only in his cell, did not constitute a substantial burden on the exercise of his religion.

The evidence at trial showed that according to Glenda Taylor, who testified at Diaz's trial, the headband had more of a cultural than a religious significance. Diaz stated that the headband continually reminds the wearer of his duties to the Creator, to fellow humans, to his family, his community and himself, and likened the headband to ceremonial headgear worn by some Christians, Jews, and Muslims. The district court determined that headbands posed a potential security threat because of the possibility of concealing contraband, including weapons, and concluded that Diaz's rights were not violated by the requirement that he wear the headband only in his cell. The district court therefore concluded that to the extent that the prison regulations inhibited the free exercise of religion, they did so in furtherance of a compelling governmental interest and were narrowly tailored to meet this purpose. *Diaz v. Collins*, 872 F.Supp. 353 (E.D.Tex. 1994).

On appeal, the Fifth Circuit affirmed the district court's rulings on the medicine pouch and headband, explaining that Diaz had failed to prove that the prison regulations at issue substantially burdened his exercise of religion. Because Diaz was confined in administrative segregation, he was in his cell for some 22 hours per day, during which time he was allowed to wear his medicine pouch and headband. The Fifth Circuit also upheld the district court's conclusion regarding Diaz's hair, affirming the

finding that a prison regulation on hair length involves a compelling state interest and did not violate RFRA.

The Fifth Circuit's holding in the Longoria decision relied heavily upon Diaz. The Court explained that although RFRA had been struck down, the compelling governmental interest/least restrictive means test was carried over from RFRA to RLUIPA. Because the test was essentially the same, the Longoria decision concluded that Diaz was dispositive of that case as well.

The Claims Raised by Thunderhorse

With these cases and the appropriate legal standards in mind, the Court will turn to the specific claims raised by Thunderhorse. As set out in his amended complaint, these are: (1) confiscation of religious items; (2) denial of religious items; (3) denial of programs for shamans; (4) denial of a racial category for "Native Americans"; (5) failure to provide exemptions or accommodations for the dress code and grooming code; (6) failure to allow equal access to services for inmates in segregation; and (7) failure to honor prior agreements which he entered into with prison officials.

I & II. Confiscation and Denial of Religious Items

Thunderhorse says that he used to have several multi-colored headbands, but a new policy restricts these headbands to white only. He testified that the

Muslims are allowed to have multicolored headgear so this is discriminatory, but Pierce testified that this was not true, and that Muslims were not permitted to have such headgear.

The testimony at trial shows that prison officials have a legitimate concern that colored headgear could be used as gang identification symbols. In addition, a review of the evidence, including Thunderhorse's pleadings and testimony at trial, fails to show that the provision of a white headband rather than a multi-colored one influences Thunderhorse to act in a way that violates his religious beliefs, or forces him to choose between enjoying some generally available non-trivial benefit or following his religious beliefs. *See Adkins*, 393 F.3d at 570. In other words, Thunderhorse has not shown that this regulation "substantially burdens" his exercise of religious freedom, and the Defendants have proffered a legitimate basis for the regulation. His claim on this point is without merit.

Similarly, Thunderhorse refers to an incident in which a warden confiscated a quartz crystal upon determination that the item was simply a piece of plastic.[7] He says that he had possessed this crystal for a number of years, and had a photograph of himself with the crystal around his neck. However, none of Thunderhorse's pleadings indicate that confiscation of the crystal amounted to a substantial burden upon his religious faith, nor that this confiscation was not done in accordance with TDCJ-

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[7] Thunderhorse does not make clear if this is an accurate determination.

CID policy. As noted above, policy allows inmates to keep seven sacred stones, among other natural objects. Instead, this claim appears to be one for the random and unauthorized confiscation of personal property.

The doctrine of *Parratt v. Taylor*, 451 U.S. 527, (1981) (overruled in part on grounds not relevant here) and *Hudson v. Palmer*, 468 U.S. 517 (1984), known collectively as the *Parratt/Hudson Doctrine*, states that a random and unauthorized deprivation of a property or liberty interest does not violate procedural due process if the State furnishes an adequate post-deprivation remedy. *See Caine v. Hardy*, 943 F.2d 1406, 1412 (5th Cir. 1991). Three predeprivation conditions must exist before the doctrine can be applied. These are: (1) that the deprivation be unpredictable; (2) that predeprivation process be impossible, making any additional safeguard useless; and (3) that the conduct of the state actor be unauthorized. Where these conditions exist, the State cannot be required to do the impossible by providing predeprivation process. *Charbonnet v. Lee*, 951 F.2d 638, 642 (5th Cir. 1992), *citing Zinermon v. Burch*, 494 U.S. 113 (1990); *Myers v. Klevenhagen*, 97 F.3d 91, 94-95 (5th Cir. 1996).

Hudson holds that deprivations of property by prison officials, even when intentional, do not violate the Due Process Clause of the Fourteenth Amendment provided that an adequate state post-deprivation remedy exists. *Hudson*, 468 U.S. at 533. The Texas state administrative and judicial systems provide an adequate state post-deprivation remedy.

Tex. Gov. Code Ann. art. 501.007 (Vernon Supp. 1994); *see also Murphy v. Collins*, 26 F.3d 541, 543-44 (5th Cir. 1994). Thus, the appropriate forum for this claim lies in state court or in the administrative procedures of TDCJ rather than federal court. *Simmons v. Poppell*, 837 F.2d 1243 (5th Cir. 1987). Thunderhorse's claim on this point is without merit.[8]

Thunderhorse further complains that he must get his medicine bag from an "approved vendor," which in his pleadings he says is "sacrilegious." This same requirement was addressed in *Diaz*, and the Fifth Circuit concluded that the policy did not on its face violate the Constitution. In that case, the prison representatives agreed that Diaz could obtain a medicine bag from a non-approved vendor provided that it was sent through the unit warden's office and that he allowed visual inspections of the bag. At trial, Thunderhorse acknowledged that he currently has a medicine bag, which was provided to him by Chaplain Rose. He did not allege that this bag or the means by which he obtained it were "sacrilegious." Thunderhorse's claim on this point is foreclosed by *Diaz*.

III. Denial of Recognition of Native American Shamanism

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[8] In addition, the Court notes that while the size of the crystal is not specified, there is no question that a large stone (or piece of plastic) could putatively pose a security threat, particularly if, like many crystals, it was sharp or could be sharpened.

Thunderhorse placed great emphasis on the fact that TDCJ recognizes some 136 religious faiths, but does not recognize Native American shamanism. He noted that the prison system recognizes a faith called the Church of Jesus Christ Christian-Aryan.

The 1997 TDCJ faith codes list includes the Church of Jesus Christ Christian (Aryan Nations). Although Pierce testified at trial that "this was not a racial group," this is patently incorrect. That church by its own description believes in a doctrine called Christian Identity, which teaches, *inter alia.* that Adam was the father of the white race only, that the Jews are descended from Satan and are the enemy of the white Christian race, being "a parasite that attacks our racial body to destroy our great culture and the purity of our race," and that blacks are "two-legged beasts." *See* http://www.aryannations.org/; *see also*http://www.adl.org/learn/ext_us/Aryan_Nations.asp. The Church of Jesus Christ Christian, and the Christian Identity movement, is discussed in the FBI's Project Megiddo Report on Domestic Terrorism, which states as follows:

> Nevertheless, Christian Identity is the most unifying theology for a number of these diverse groups and one widely adhered to by white supremacists. It is a belief system that provides its members with a religious basis for racism and an ideology that condones violence against non-Aryans. This doctrine allows believers to fuse religion with hate, conspiracy theories, and apocalyptic fear of the future. Christian Identity-

> inspired millennialism has a distinctly racist tinge in the belief that Armageddon will be a race war of Aryans against Jews and nonwhites.

See
http://permanent.access.gpo.gov/lps3578/www.fbi.gov/library/megiddo/megiddo.pdf.

The Court can discern no rational basis in the prison officials' contention that an organization such as the Church of Jesus Christ Christian-Aryan Nations is accepted as a legitimate religious faith and designated with a faith code, but Native American shamanism cannot be. In addition, while prison officials testified that Thunderhorse was the only Native American shamanic practitioner that they knew of, the Defendants' exhibits show that the number of adherents alone is not dispositive; the religious faith code list for March 31, 1996, lists a faith with *two* adherents (Druid) and another with *three* (Quaker), and on the December 31, 1997 list, there were *four* Quakers and *six* Druids, yet these belief systems had their own faith codes. Thunderhorse's request for recognition of Native American shamanism is meritorious and should be granted; Native American shamanism should be recognized as a legitimate faith, with its own faith code, as a sub-set of Native American religion, in the same manner that Baptists, Presbyterians, and Methodists are recognized as legitimate faiths, with their own faith codes, as sub-sets of Christianity.

However, this does not mean that any special privileges will necessarily flow from such

recognition. As part of his shamanic faith, Thunderhorse said that he wanted access to a musical instrument, and TDCJ policies allow for such access, but only in connection with use in a pipe ceremony. *See* TDCJ Chaplaincy Policy No. 9.01 (rev. 2). This policy says that medicine bundles, used in pipe ceremonies, may contain a small clay flute for music, a small hand-held drum, and gourds and deer claw shakers for music and rhythm. Because Thunderhorse is in administrative segregation, he does not have access to pipe ceremonies for security reasons, which reasons represent compelling governmental interests. *Cutter*, 125 S.Ct. at 2123. In the event that Thunderhorse is released from administrative segregation into the general prison population, he should be given access to pipe ceremonies as well as approved musical instruments in accordance with TDCJ policies governing Native American practitioners who are housed in general population. Thunderhorse's request that he be given access to a flute or drum thus lacks merit for so long as he is housed in administrative segregation.

To the extent that Thunderhorse complains that those services which are available to him in administrative segregation are geared toward Native American non-shamanists and are unsuitable for shamanists, his claim in this regard is similar to that in *Freeman*, in which the Church of Christ plaintiffs complained that the general Christian non-Catholic service was not suitable for them. However, their claim that they were entitled to a wholly separate service was rejected by the Fifth Circuit. In this case, Thunderhorse has failed to show that he

does not have a reasonable opportunity to practice his faith; rather, the evidence shows that the lack of services congruent with Thunderhorse's beliefs is due to the fact that Thunderhorse is confined in administrative segregation and to a lack of volunteers rather than any discriminatory purpose.

In a similar vein, Thunderhorse complains that the TDCJ policy designating holy days for Native Americans are oriented toward the Plains Indian culture. As noted above, TDCJ cannot reasonably be expected to differentiate between the holy days for all of the branches of Native American religion. In addition, Thunderhorse has not shown that the fact that the holy days designated for Native Americans within TDCJ-CID are oriented towards Plains Indians places a substantial burden upon his religious practice. He is in administrative segregation and so does not require lay-ins from work, and the evidence shows that inmates are permitted to request additional holy days if they desire. As was the case in *Freeman*, Thunderhorse's claims on this point are without merit.

IV. Denial of a Racial Category for Native Americans

Thunderhorse complains that TDCJ does not recognize "Native American" as a racial category, thus depriving him of benefits which he could otherwise obtain. The prison officials respond that Thunderhorse could not benefit from such a category because the tribe in which he claims membership, the Quinnipiac Indians, is not federally recognized.

Thunderhorse asserts that the tribe's application for federal recognition is currently pending.

Thunderhorse does not identify any benefits of which he claims to have been deprived, nor any harms which he has suffered, as a result of the fact that TDCJ-CID does not have a racial category for Native Americans. For example, there is no indication in the record that TDCJ has or enforces a policy limiting participation in Native American ceremonies to persons with provable Native American ancestry.[9] Thunderhorse has not shown any basis for relief on this point and so this claim is without merit.

V. Exemptions to the Dress Code and Grooming Code

The parties spent a considerable period of time at trial discussing the TDCJ grooming code. While the Court does not dispute that the wearing of long hair is important to practitioners of Native American religions,[10] this is an issue which has been settled by the Fifth Circuit. In *Longoria v. Dretke*, 507 F.3d 898, 904 (5th Cir. 2007), the Fifth Circuit upheld the dismissal of an inmate's challenge to the TDCJ grooming code based on religious reasons. This Court is bound by the Fifth Circuit's decision in this

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[9] The Fourth Circuit has held such a policy to be unconstitutional. *Morrison v. Garraghty*, 239 F.3d 648 (4th Cir. 2001).

[10] *See, e.g., Diaz v. Collins*, 114 F.3d 69, 72-73 (5th Cir. 1997); *accord, Teterud v. Burns*, 522 F.2d 357, 359-60 (8th Cir. 1975); R. Thunderhorse, Following the Footprints of a Stone Giant, pp. 87-88.

regard, and so Thunderhorse's claim on this point is without merit.

To the extent that Thunderhorse complains that he cannot wear his headband or medicine pouch outside of his cell, this claim is without merit. The evidence before the Court includes an affidavit from Nathaniel Quarterman, now the Director of TDCJ-CID, which points out that TDCJ has a security concern regarding the presence of gangs, who often use clothing or insignia to identify members; for this reason, such items as Kufi caps worn by Muslims or medicine bags and headbands worn by Native Americans may only be worn inside of cells or during religious services. In addition, the plaintiff in Diaz challenged the requirement that the headband and medicine pouch could only be possessed inside his cell, but the dismissal of this claim was affirmed by the Fifth Circuit. *Diaz, 114 F.3d at 73.* Thunderhorse's claim on this point is without merit.

VI. Access to Services in Segregation

In his complaint, Thunderhorse asserts that TDCJ-CID's policies do not allow "equal access to services" for inmates confined in administrative segregation. According to the TDCJ-CID Inmate Orientation Handbook, administrative segregation is a classification for offenders who must be separated from the general population because they are dangerous to other offenders or to staff, or because they are in danger from other offenders. Those inmates in administrative segregation may have a chaplain or volunteer visit.

The Constitution requires that inmates be given a "reasonable opportunity" to practice their religion. *Pedraza v. Meyer*, 919 F.2d 317. 320 (5th Cir. 1990). Thunderhorse has failed to show that he has been denied such an opportunity by reason of his confinement in segregation. As noted above, TDCJ policy allows him to possess numerous sacred objects and to have a religious chaplain or volunteer visit; Thunderhorse does not indicate that he has sought to avail himself of such visitation opportunities and has been denied. It is clear that Thunderhorse has access to research and other materials, presumably including religious materials; he has written and published numerous articles, including the Metacomet-Mattabesett Trail Study, written in March of 2004 and reprinted on the website of the Algonquian Confederacy of the Quinnipiac Tribal Council (ACQTC) (http://acqtc.com/branford040326 .php), articles for the ACQTC newsletter as well as a number of other publications, and at least one book as well as various articles on shamanism. *See* Thunderhorse & Le Vie, Return of the Thunderbeings (Bear & Co., 1990).

The TDCJ policies prohibiting access to communal services for inmates in segregation are related to the compelling state interest of maintaining security, in that inmates in administrative segregation are placed there because they pose a danger to others or are in danger from others. Thunderhorse has adequate alternative means to practice his religion through private worship in his cell, including possession of religious

artifacts and literature, and through the opportunity to receive religious visitors. *See Pedraza*, 919 F.2d at 320. This claim is without merit.

VII. Failure to Honor Prior Agreements

Thunderhorse contends that he had entered into a series of agreements with TDCJ regarding his faith, which he asserts are not being kept, although he offers no evidence of any of these agreements. Thunderhorse's pleadings indicate that these agreements were arrived at through litigation; he cites a case which he filed with the help of an ACLU attorney named Patrick Wiseman in the Western District of Texas, which he says resulted in the "third out-of-court settlement."

The cause number for the lawsuit filed by Wiseman on Thunderhorse's behalf is 1:95cv222 (W.D.Tex.). A review of the docket in this cause shows no evidence of a settlement agreement; rather, the record shows that on September 9, 1997, Magistrate Judge Alan Albright entered a Report recommending that the defendants' motion for summary judgment be granted as to the prison grooming policies and that the claim of denial of access to religious publications be transferred to the U.S. District Court for the Southern District of Texas. This recommendation was adopted over the plaintiffs' objections. Following this transfer, Thunderhorse's claims were dismissed with prejudice on March 2, 1998. Neither the Western District nor the Southern District made any mention of a settlement agreement.

Even assuming that any settlement agreements existed, however, Thunderhorse has failed to show that these agreements are enforceable by this Court. The Supreme Court has held that enforcement of a settlement agreement, whether through damages or a decree of specific enforcement, is more than just a continuation or renewal of the dismissed lawsuit, and hence requires its own basis for jurisdiction; however, the mere claim of breach of a prior settlement agreement is insufficient in and of itself to confer federal court jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 378 (1994). The Supreme Court rejected the theory that the doctrine of ancillary jurisdiction provided a basis for federal court jurisdiction over such claims, although stating that the terms of the dismissal order itself could allow the court to retain jurisdiction over the settlement contract. *Kokkonen*, 511 U.S. at 381; *accord, Langley v. Jackson State University*, 14 F.3d 1070, 1074 (5th Cir. 1994).

In this case, even if these settlement agreements exist, Thunderhorse has not shown any basis for his contention that this Court should enforce these agreements, nor does it appear that the Court would have jurisdiction to enforce settlement agreements entered into with other federal district courts in the State of Texas. In effect, the settlement agreement becomes a contract between the parties, which may give rise to a breach-of-contract action in state court but fails to accord any basis of jurisdiction in a federal court other than the one in which the settlement agreement was reached. *Hospitality*

House Inc. v. Gilbert, 298 F.3d 424, 431 (5th Cir. 2002), *citing Kokkonen*, 511 U.S. at 381-82.[11] His claim on this point fails for want of jurisdiction.

Other Claims

VIII. Treaty Allegations

Thunderhorse claims that his rights under various other treaties and laws, including the Indian Civil Rights Act (25 U.S.C. 1301 et seq.), U.S. treaty law, the Universal Declaration of Human Rights, and the United Nations Covenant on Civil and Political Rights, have been violated. The Indian Civil Rights Act provides that in exercising powers of self-government, Indian tribes may not take certain actions, corresponding to the guarantees of

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[11] The Fifth Circuit has held that federal courts have the inherent power to enforce settlement agreements entered into by the parties in a case pending before it, to determine compliance with procedural prerequisites, and to determine when, if ever, a party may repudiate a contractually binding settlement agreement. *White Farm Equipment Co. v. Kupcho*, 792 F.2d 526, 529 and n.4 (5th Cir. 1986); *Mid-South Towing Co. v. Har-Win, Inc.*, 733 F.2d 386, 389 (5th Cir. 1984). The district court has the power to enforce *summarily* a settlement agreement reached in a case pending before it. *Mid-South Towing, 733 F.2d at 389* (emphasis added). Such enforcement may be done without regard to what the result might have been had the parties chosen to litigate. *Terrain Enterprises v. Western Casualty and Surety Co.*, 774 F.2d 1320, 1321 (5th Cir. 1985). The cases in which Thunderhorse claims that settlements were reached were not pending before or decided by this Court, and so this Court is not the appropriate forum in which to enforce such settlements.

individual liberties set out in the Bill of Rights (25 U.S.C. 1302) and provides that the writ of habeas corpus shall be available to test the legality of detention by order of an Indian tribe *(25 U.S.C. 1303)*. The courts have held that the Act is not an affirmative declaration of rights, but is negative in form and forbids certain tribal actions. *Spotted Eagle v. The Blackfeet Tribe of the Blackfeet Indian Reservation, City of Browning*, 301 F.Supp. 85, 89 (D.Mont. 1969). Because Thunderhorse is not challenging a tribal action, this Act is inapplicable to his case.

Next, Thunderhorse raises the issue of treaty law, but fails to show that any treaties exist between the United States and the Quinnipiac tribe under which he may make a claim of right. *See* Kappler, Indian Affairs: Laws and Treaties, available on-line at
http://digital.library.okstate.edu/kappler/index.htm
(containing no mention of any treaties with the Quinnipiac Indians). Thunderhorse's invocation of treaty rights, lacking any evidence that a treaty with his tribe exists, is without merit.

Nor has Thunderhorse shown that any treaties with any of the other tribes making up the Algonquin Family of Nations afford him any protected rights. He invokes a document called the International Indian Treaty Council's Declaration of the Spiritual Rights of Native American Prisoners, but does not show that this document has any binding effect or that he has standing to bring claims

under it.[12] Finally, Thunderhorse raises claims under the Universal Declaration of Human Rights and the United Nations Covenant on Civil and Political Rights. These documents are addressed to the obligations of governments and do not confer standing on individual plaintiffs to bring suit. *Dickens v. Lewis*, 750 F.2d 1251, 1254 (5th Cir. 1984); *Diggs v. Richardson*, 180 U.S. App. D.C. 376, 555 F.2d 848, 850 (5th Cir. 1984). Thunderhorse's claims under these charters is without merit.

In a similar vein, Thunderhorse asserts that TDCJ-CID policies violate his "sovereign and autonomous cultural integrity" as well as that of his tribe, which he describes as a tribal confederation with 501(c)(3) status, in violation of Article I(3) and Section 8(3) of the Constitution as well as *Article VI(2),* relating to Indian treaties.

The motion to intervene by ACQTC and TUELN, the Traditional United Eastern Lenope Confederacy Nation was denied on September 1, 2005. As a non-attorney *pro se* plaintiff, Thunderhorse cannot represent these parties in litigation. *Guajardo v. Luna*, 432 F.2d 1324 (5th Cir. 1970). The fact that ACQTC is a Section 501(c)(3) corporation does not provide any special basis upon which to intervene in this lawsuit. Furthermore, the interest of these groups, as stated in the motion to intervene which is

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[12] The International Indian Treaty Council is a non-governmental organization with consultive status to the United Nations Economic and Social Council. *See* http://www.treatycouncil.org/about.htm.

written in Thunderhorse's handwriting, is the protection of the right to religious liberty of Thunderhorse, the Grand Sachem. Because Thunderhorse has not shown that his right to religious liberty was violated, there is likewise no showing that any protected rights of the would-be intervenors was violated. This is underscored by the fact that Thunderhorse has continued to write articles for the ACQTC newsletter and other organizations, thus allowing him a means by which to "preserve [our] language, religion, history and culture," as stated in the motion to intervene. This claim is without merit.

IX. Retaliation

Thunderhorse asserts throughout his complaint that he has been the victim of retaliation. He says that all of the sacred items allowed for him during the past decade have been confiscated or destroyed or forced to be sent home, due to "vague and ambiguous changes and interpretations" which served as "official excuses to discriminate and retaliate." Thunderhorse says that he has been subjected to acts of discrimination and retaliation, including: repeated disciplinary cases for violating grooming standards; harm and threats of harm by use of tear gas; destruction of handicap aids such as glasses and UV shields; and placement in administrative segregation.

The Fifth Circuit has held that a prisoner who asserts a retaliation claim must assert specific facts; conclusory allegations are not enough. *Whittington v.*

Lynaugh, 842 F.2d 818, 820 (5th Cir. 1988); *Moody v. Baker*, 857 F.2d 256, 258 (5th Cir. 1988). The elements of a claim under a theory of retaliation are the invocation of a specific constitutional right, the defendant's intent to retaliate against the plaintiff for his exercise of that right, a retaliatory adverse act, and causation, which is a showing that but for the retaliatory motive, the action complained of would not have occurred. *Johnson v. Rodriguez*, 110 F.3d 299, 310 (5th Cir. 1997). The relevant showing must be more than the prisoner's personal belief that he is *the victim of retaliation. Johnson, 110 F.3d at 310, citing Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995).

The Fifth Circuit has cautioned as follows:

> The prospect of endless claims of retaliation on the part of inmates would disrupt prison officials in the discharge of their most basic duties. Claims of retaliation must therefore be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions.

Woods v. Smith, 60 F.3d 1161, 1166 (5th Cir. 1995). The Court went on to explain that district courts must "carefully scrutinize" claims of retaliation in order to ensure that prisoners do not "inappropriately insulate themselves from disciplinary actions by drawing the shield of retaliation around themselves." *Woods*, 60 F.3d at 1166; *accord, Orebaugh v. Caspari*, 910 F.2d 526, 528 (8th Cir. 1990) (noting that "while a prisoner can

state a claim of retaliation by alleging that disciplinary actions were based upon false allegations, no claim can be stated when the alleged retaliation arose from discipline imparted for acts that a prisoner was not entitled to perform."). As the Eighth Circuit explained, any other rule would allow a prisoner to openly flout prison regulations after filing a grievance and then bring a claim under *Section 1983* arguing that prison officials disciplined him in retaliation for filing a grievance. *Orebaugh*, 910 F.2d at 528.

In this case, Thunderhorse simply alleges that events allegedly adverse to him have occurred recently, and concludes that these must have been the result of retaliation. He does not offer a chronology of events from which retaliation may plausibly be inferred; his contention that his past legal battles with TDCJ-CID have led to the implementation of policies which he considers unfavorable is simply too tenuous to support a claim of retaliation. Inmates cannot bring legal action against TDCJ and then forever after claim that any adverse actions by prison officials were necessarily motivated by retaliatory intent from the prior legal action. *Orebaugh*, 910 F.2d at 528; *Woods*, 60 F.3d at 1166 (noting that inmates must produce either direct evidence of retaliation or a chronology of events from which retaliation may *plausibly* be inferred) (emphasis added). Nor can Thunderhorse refuse to comply with TDCJ's grooming code and then claim that punishments imposed for this failure to groom

were retaliatory in nature. His retaliation claim is without merit.[13]

X. Diet

Thunderhorse complains that he is being denied a special religious diet. At trial, he referred to wanting a special diet for feast days, including fish and wild game, although he conceded that chicken could be substituted for wild turkey. As a general rule, prison officials are not required to accommodate particularized dietary requests which impose an undue burden. *Udey v.* Kastner, 805 F.2d 1218, 1219 (5th Cir. 1986); *Kahey v. Jones,* 836 F.2d 948, 950 (5th Cir. 1988). The Religious Land Use and Institutionalized Persons Act does not change this precedent because prison officials are entitled to consider "cost and limited resources" under RLUIPA. *Cutter,* 125 S.Ct. at 2123. For example, prison officials obviously would not be required to furnish freshly caught fish or wild turkey, but chicken would not appear to be an undue burden.

The TDCJ regulations specify that on ceremonial occasions, traditional foods may be requested and should be evaluated by the chaplain, food service

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[13] This lawsuit does not incorporate Thunderhorse's claims for specific incidents of use of force through application of tear gas; he does not name any persons involved in such incidents as defendants in the case, nor show that the named defendants in this lawsuit were responsible for such incidents. Any such claims which Thunderhorse may have regarding such specific incidents are not part of this lawsuit and are not affected by the dismissal thereof.

manager, and warden on a case-by-case basis. *See* TDCJ Chaplaincy Manual, policy no. 9.01 (Defendants' Exhibit No. 2). At trial, Pierce testified that inmates could request the designation of specific holy days. Consistent with the recognition of Native American shamanism, Thunderhorse should be allowed to request a reasonable number of holy days and the provision of traditional foods in connection with such days, so long as the preparation of such foods does not constitute an undue burden, and the Court expects that approval of such requests, when made in accordance with standard TDCJ policies and regulations, will not be unreasonably withheld.

XI. Qualified Immunity

The Defendants assert that they are entitled to the defense of qualified immunity. However, Thunderhorse makes clear that he seeks only injunctive relief. The Fifth Circuit has held that qualified immunity is not a defense to claims for declaratory or injunctive relief. *Yates v. Stalder, 217 F.3d 332, 333 n.2 (5th Cir. 2000).* The defendants' claim to the defense of qualified immunity is without merit.

Conclusion

In a trial before the bench, the Court must find the facts specially and make conclusions of law. *Rule 52(a), Fed. R. Civ. P.* This Rule recognizes and rests upon the unique opportunity afforded the trial court judge to evaluate the credibility of witnesses and to

weigh the evidence. *Inwood Laboratories v. Ives Laboratories*, 456 U.S. 844, 855 (1982).

The Court has carefully examined the record in this cause, including the Plaintiff's complaint and amended complaint, the documentary evidence submitted by the parties, and the testimony at trial. Upon such examination, it is hereby

ORDERED that the Plaintiff's request for injunctive relief is GRANTED to the extent that the religious faith of "Native American shamanism" shall be recognized as a valid faith, within the ambit of Native American religion, and shall be given its own separate faith code. All of the rights, privileges, and responsibilities which apply to Native American practitioners shall also apply to Native American shamanism practitioners. Separate services for Native American shamanism shall not be required, although such services may be permissible when approved by prison officials and in conformity with content-neutral prison regulations, such as those requiring the presence of outside volunteers. It is further

ORDERED that consistent with this recognition, the Plaintiff Iron Thunderhorse shall be permitted to request the designation of a reasonable number of holy days and to request traditional foods for feast days, in conformity with TDCJ regulations permitting inmates to make such requests. The request for traditional foods cannot be such as to impose an undue burden upon prison officials. The Court expects that the approval of such requests,

when made in the manner required by prison regulations, will not be unreasonably withheld. It is further

ORDERED that in the event of the Plaintiff's release from administrative segregation into the general population, he shall be allowed to request access to pipe ceremonies and a medicine bundle, including musical instruments such as a clay flute and a small drum, as set out in TDCJ regulations permitting such ceremonies and medicine bundles. The provision of such ceremonies and items shall not be required so long as Thunderhorse remains in administrative segregation. As above, the Court expects that the approval of such requests, when made in the manner required by prison regulations, will not be unreasonably withheld. It is further

ORDERED that any and all other relief sought by the Plaintiff Iron Thunderhorse is hereby DENIED. Finally, it is

ORDERED that any and all motions which may be pending in this cause are hereby DENIED.

So **ORDERED** and **SIGNED** this **30** day of **July, 2008.**

/s/ Judith K. Guthrie
JUDITH K. GUTHRIE
UNITED STATES MAGISTRATE JUDGE

APPENDIX C
Exhibit No. 5

STATE	HAIR LENGTH RESTRICTION	IF YES, RELIGIOUS EXEMPTION
Alabama	yes	no
Alaska	no	
Arizona	no	
Arkansas	yes	no
California	Warsoldier lawsuit—policy being revised	
Colorado	no	
Florida	yes	no
Georgia	Becket Fund lawsuit—policy being revised	
Idaho	no	
Illinois	no	
Indiana	no	
Iowa	no	
Kansas	no	
Maine	no	
Michigan	no	
Minnesota	no	
Mississippi	yes	no
Missouri	no	
Montana	no	
Nebraska	lawsuit—policy being revised	
Nevada	no	
New Hampshire	no	
New Mexico	yes	yes
New York	yes	yes

STATE	HAIR LENGTH RESTRICTION	IF YES, RELIGIOUS EXEMPTION
North Carolina	policy currently under review	
North Dakota	no	
Ohio	yes	yes
Oklahoma	no	
Oregon	no	
Pennsylvania	yes	yes
Rhode Island	no	
South Dakota	no	
Utah	no	
Virginia	grooming policy in review	
Washington	no	
West Virginia	yes	yes
Wisconsin	no	
Wyoming	Native American religious program permits traditional hair style	

TOTAL STATES REPORTING	38
Number of states with hair length restrictions without exemption	4
Number of states with hair length restrictions but exemptions allowed	5
Number of states with NO HAIR LENGTH RESTRICTIONS	24
States with grooming policy in review	5

STATES WITH NO RESTRICTION OR WITH EXEMPTIONS	76.30%
STATES WITH RESTRICTION BUT NO EXEMPTION	10.50%
STATES WITH GROOMING POLICY UNDER REVIEW	13.20%

100.00%

[Pie chart of percentages omitted.]

EXHIBIT NO. 5

Supreme Court, U.S.
FILED
JUN 7 - 2010
OFFICE OF THE CLERK

No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether a prison grooming code that prohibits inmates from growing long hair "is the least restrictive means of furthering [the] compelling governmental interest" in prison security, such that it withstands scrutiny under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc-1(a)(1)-(2).

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In the Supreme Court of the United States

No. 09-1353

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

1. The Texas Department of Criminal Justice ("TDCJ") has determined that hirsute inmates present special security risks. Prisoners can use long hair to smuggle weapons, drugs, and other contraband, and searching through this kind of hair requires potentially dangerous interactions between guards and prisoners. Long-haired prisoners also present a heightened escape risk, because a fugitive seeking to avoid detection can rapidly change his appearance by cutting off his hair. To mitigate these security risks, the TDCJ grooming code states that a male inmate must wear neatly cut hair that is trimmed in the back and cut around the ears. Pet. 4.

Petitioner is a practitioner of Native American Shamanism who has legally changed his name from William Coppola to Iron Thunderhorse. Pet. App. 4a, 20a, 27a, 43a n.6. He is forbidden by the tenets of his religion to cut his hair. *Id.* at 8a, 27a-28a; see

also *id.* at 69a n.10 (citing Ruth Thunderhorse, *Following the Footprints of a Stone Giant—The Life and Times of Iron Thunderhorse* 87-88 (2007)). Petitioner's beliefs have come into conflict with the TDCJ grooming code due to his imprisonment, a result of his having been convicted of robbery, rape, kidnapping, and attempted escape. See Pet. 7 & n.1; Pet. App. 4a.[1]

At some point during his incarceration, petitioner grew his hair long enough to wear it in braids that fell to his lower back. Pet. App. 4a. Petitioner alleges he was permitted to grow long hair while in administrative segregation at TDCJ's Stiles Unit, although he had to cut it upon entering the prison's general population. *Id.* at 28a, 30a. He kept his severed braids with him at the Stiles Unit. *Id.* Petitioner was transferred to TDCJ's Polunsky Unit in August 2004, *id.* at 4a, 29a, where he resided in general population until his assault on a prison guard in June 2006, *id.* at 5a, 21a. His braids were sent to his wife upon his consequent return to administrative segregation, *id.* at 28a-29a, and are now part of the record, *id.* at 4a n.1.

While confined at the Polunsky Unit, petitioner unsuccessfully sought a religious exemption to the TDCJ grooming code. Pet. App. 5a. He is therefore

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[1] Petitioner claims to have "the safest possible security rating in the Texas prison system." Pet. 27. This factual assertion, for which the petition offers no record support, is difficult to square with petitioner's assault on a prison guard in 2006, Pet. App. 21a, his attempt to escape from prison in 1991, Pet. 7 n.1, and his multiple periods of confinement in administrative segregation, Pet. App. 21a, 28a.

unable to wear his hair at a length that is acceptable under the tenets of his faith. Pet. 4-5.

2. Acting *pro se*, petitioner sued respondents, who are TDCJ officials, under 42 U.S.C. 1983.in the United States District Court for the Eastern District of Texas. Pet. App. 2a, 20a. Among other things, petitioner claimed that the TDCJ grooming code violates the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 803 (codified at 42 U.S.C. 2000cc to 2000cc-5). Pet. App. 6a, 20a-26a. As relevant here, Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the burden furthers "a compelling governmental interest" by way of "the least restrictive means." 42 U.S.C. 2000cc-1(a)(1)-(2). Petitioner argued that the grooming code imposed a substantial burden by forcing him to cut his hair, and that the grooming code was not the least restrictive means of achieving TDCJ's compelling interest in prison security. Pet. App. 8a. He sought injunctive relief in the form of a religious exemption to the TDCJ grooming code. *Id.* at 26a.

Petitioner's case was referred to a magistrate judge pursuant to 28 U.S.C. 636. The district court granted respondents' motion for summary judgment and dismissed all of petitioner's claims, including his grooming code claim. *Thunderhorse* v. *Pierce*, 418 F. Supp. 2d 875, 894-895, 899 (E.D. Tex. 2006). Petitioner argued on appeal that he had not filed all of his evidence, and that the magistrate judge failed to give adequate notice that the case would be resolved by summary judgment. *Thunderhorse* v.

Pierce, 232 F. App'x 425, 426 (5th Cir. 2007) (per curiam). Concluding that petitioner had not received sufficient notice, the United States Court of Appeals for the Fifth Circuit vacated the judgment and remanded for further proceedings. *Id.* at 426-427.

On remand, the magistrate judge held a bench trial. Pet. App. 3a, 20a, 26a. "The parties spent a considerable period of time at trial discussing the TDCJ grooming code." *Id.* at 69a. On the strength of Fifth Circuit precedent upholding the TDCJ grooming code against challenges under RLUIPA and its predecessor statute, the Religious Freedom Restoration Act of 1993 ("RFRA"), 107 Stat. 1488, the district court rejected petitioner's grooming code claim. Pet. App. 69a-70a (citing *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (per curiam), and *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997)). As the district court explained, *id.* at 58a-61a, the Fifth Circuit had already held that the TDCJ grooming code is the least restrictive means of furthering the compelling interest in prison security because it removes a hiding place for weapons and contraband, and makes it harder for fugitives to alter their appearance upon escape, see *Longoria*, 507 F.3d at 904; *Diaz*, 114 F.3d at 72-73. The district court denied petitioner's request for an injunction as to the grooming code, while granting other relief not relevant here. Pet. App. 82a-83a.

3. The Fifth Circuit affirmed the judgment. Pet. App. 19a. Regarding the TDCJ grooming code, the court of appeals held that petitioner's RLUIPA claim was foreclosed by its decisions in *Longoria* and *Diaz*. *Id.* at 8a-10a. The court reiterated that "prisoners may hide weapons and other contraband in their

hair," and that "requiring short hair makes it more difficult for an escaped prisoner to alter his appearance." *Id.* at 9a (citing *Longoria*, 507 F.3d at 904, and *Diaz*, 114 F.3d at 73); see also *id.* at 9a n.2 (noting that respondents entered evidence to this effect during bench trial, along with testimony that long hair endangers inmates during altercations). The court considered itself bound by circuit precedent to reject petitioner's invocation of *Warsoldier* v. *Woodford*, 418 F.3d 989 (9th Cir. 2005), "in which the Ninth Circuit issued a preliminary injunction, pursuant to RLUIPA, that prevented the California Department of Corrections from enforcing its hair length restriction against a Native American inmate." Pet. App. 10a n.3.

ARGUMENT

The Petition Should Be Denied Because There Is No Circuit Split Concerning The Legality Of Prison Grooming Codes Under RLUIPA

Petitioner contends that "[t]he circuit split over hair length restrictions" warrants review by this Court, Pet. 10, pointing repeatedly to the Ninth Circuit's *Warsoldier* decision, *id.* at 9, 10, 13, 14, 15 n.3. Petitioner is wrong. The legality of prison grooming codes under RLUIPA has not divided the circuits. The Ninth Circuit's limited treatment of this issue arose in the preliminary-injunction context and therefore did not represent that circuit's final disposition. Every circuit that has squarely confronted this issue has concluded that RLUIPA does not prohibit prison grooming codes. In the absence of a genuine conflict among the circuits, the petition should be denied.

1. The Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits have all upheld prison grooming codes against RLUIPA challenges, in cases squarely presenting the issue for decision on the merits. See *McRae* v. *Johnson*, 261 F. App'x 554, 558-560 (4th Cir. 2008) (per curiam); *Ragland* v. *Powell*, 193 F. App'x 218, 219 (4th Cir. 2006) (per curiam); Pet. App. 8a-10a; *Bisby* v. *Crites*, 312 F. App'x 631, 632 (5th Cir. 2009) (per curiam); *Longoria* v. *Dretke*, 507 F.3d 898, 904 (5th Cir. 2007) (per curiam); *Williams* v. *Snyder*, No. 08-1908, 2010 WL 750105, at *3 (7th Cir. Mar. 5, 2010) (per curiam); *Fegans* v. *Norris*, 537 F.3d 897, 902-908 (8th Cir. 2008); *Brunskill* v. *Boyd*, 141 F. App'x 771, 776 (11th Cir. 2005) (per curiam); cf. *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 369-372 (6th Cir. 2005) (reversing preliminary injunction that prevented prison officials from enforcing grooming code on RLUIPA grounds). In cases decided prior to *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), the Fifth, Eighth, and Eleventh Circuits have likewise upheld prison grooming codes under RFRA's substantially identical standard. See *Diaz* v. *Collins*, 114 F.3d 69, 73 (5th Cir. 1997); *Hamilton* v. *Schriro*, 74 F.3d 1545, 1554-1555 (8th Cir. 1996); *Harris* v. *Chapman*, 97 F.3d 499, 504 (11th Cir. 1996).[2]

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[2] RFRA and RLUIPA impose the same standard: a government can justify a substantial burden on religious exercise by showing that the burden is the least restrictive means of furthering a compelling governmental interest. Compare 42 U.S.C. 2000bb-1(b)(1)-(2), with 42 U.S.C. 2000cc-1(a)(1)-(2). Accordingly, courts rely on RFRA precedent in RLUIPA cases. See, *e.g.*, *Fegans*, 537 F.3d at 903; *McRae*, 261 F. App'x at 558 n.2; *Longoria*, 507 F.3d at 901; *Hoevenaar*, 422 F.3d at 368.

These circuits recognize that a grooming code is the least restrictive means of furthering a compelling interest in prison security. After full consideration of the issue, these courts have concluded that long hair and beards facilitate inmates' concealment of weapons and contraband, and frustrate efforts to capture escaped inmates. See, *e.g.*, *Fegans*, 537 F.3d at 903-904 (noting that findings to this effect were the product of "a complete bench trial conducted over three days with ten witnesses"); *Longoria*, 507 F.3d at 904 (noting that findings to this effect in *Diaz*, 114 F.3d at 73, were the result of the district court's "expanded evidentiary hearing"); cf. Pet. 22 (noting that the courts below rejected petitioner's RLUIPA challenge to the TDCJ grooming code only after he had "fully presented all available evidence and * * * fully argued the merits").

For example, the Fourth Circuit cited instances in which inmates hid razor blades, tobacco, wire, and rope in long hair and beards, *McRae*, 261 F. App'x at 559, while the Eighth Circuit spoke of "specific examples showing that inmates had used their hair to conceal contraband and to change their appearance after escaping," *Fegans*, 537 F.3d at 903. Similarly, the Seventh Circuit noted "undisputed evidence" that inmates had used long dreadlocks to "conceal drugs, sharp plastic objects, needles, makeshift blades constructed from pens, and even kitchen knives," as well as "black thread [used] to create makeshift handcuff-saws by coating the thread with toothpaste and letting it harden and dry." *Williams*, 2010 WL 750105, at *1, *3. And as the Eleventh Circuit admitted, "we are unable to suggest any lesser means than a hair length rule" of

addressing these prison security problems. *Harris*, 97 F.3d at 504; see also *Williams*, 2010 WL 750105, at *1, *3 (rejecting as inadequate proposed grooming code alternatives, such as metal detectors, guard-administered hair searches, and self-administered hair searches by inmates).

In light of the detrimental effect of long hair and beards on prison security, and the absence of alternative solutions, circuits that have squarely addressed the issue have held that RLUIPA and RFRA do not foreclose prison grooming codes. These decisions reflect appropriate deference to prison officials. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 722 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety."); *id.* at 723 ("Lawmakers supporting RLUIPA * * * anticipated that courts would apply the Act's standard with due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." (internal quotation marks omitted)).

2. Petitioner contends that the foregoing decisions and the decision below conflict with *Warsoldier* v. *Woodford*, 418 F.3d 989 (9th Cir. 2005). Pet. 13-14. *Warsoldier* does not create a circuit split worthy of resolution in this Court, because it was not a final decision on the merits. In that case, the Ninth Circuit reversed the district court's denial of a preliminary injunction against enforcement of a prison grooming code, after concluding that the prisoner was likely to succeed on the merits of his

RLUIPA challenge. *Warsoldier*, 418 F.3d at 1002. Judge Pregerson, writing for the court, expressed skepticism as to whether a grooming code is the least restrictive means of achieving the compelling interest in prison security. *Id.* at 998-1001. Noting that some prisons do not limit hair length, *id.* at 999-1000, and that female inmates were not subjected to the grooming code at issue, *id.* at 1000-1001, the court concluded that, "[a]t a minimum, there exists [sic] serious questions going to the merits of Warsoldier's claims," *id.* at 1001.

Warsoldier does not create a circuit split with the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits, notwithstanding Judge Pregerson's skepticism. Arising as it did in the context of a preliminary injunction, *Warsoldier* "may not be considered a 'final judicial decision based on the actual merits of the controversy.'" *N.Y. State Liquor Auth.* v. *Bellanca*, 452 U.S. 714, 716 (1981) (per curiam) (quoting *Univ. of Tex.* v. *Camenisch*, 451 U.S. 390, 396 (1981)). In reviewing the denial of a preliminary injunction, the Ninth Circuit was in no position to speak to "the ultimate merits" of the case. See *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 934 (1975) (quoting *Brown* v. *Chote*, 411 U.S. 452, 457 (1973)). Instead, the Ninth Circuit addressed only the likelihood that Warsoldier's RLUIPA challenge would succeed. *Haley* v. *Donovan*, 250 F. App'x 202, 203 (9th Cir. 2007) ("In [*Warsoldier*], this court held that an inmate challenging [a grooming code] had *shown serious questions* going to the merits of his claim that the regulation violated RLUIPA * * * ." (emphasis added)); *David* v. *Giurbino*, 488 F. Supp. 2d 1048, 1059 (S.D. Cal. 2007) ("In *Warsoldier*, the

Ninth Circuit * * * held that the plaintiff was likely to prevail on the merits of his RLUIPA claim challenging the grooming policy."). As this Court has noted, "likelihood of success" does not equal "success." *Camenisch*, 451 U.S. at 394.[3]

Warsoldier illustrates why "it is generally inappropriate for a federal court at the preliminary-injunction stage to give a final judgment on the merits." *Camenisch*, 451 U.S. at 395. In reversing the denial of a preliminary injunction, the Ninth Circuit faulted the government for "present[ing] only conclusory statements" in defense of its grooming code, and for failing to "discuss whether it ha[d] ever considered a less restrictive approach." *Warsoldier*, 418 F.3d at 998-999. Such failures of proof are symptomatic of "the haste characteristic of a request for a preliminary injunction." *Camenisch*, 451 U.S. at 398; see also *Firefighters Local Union No. 1784* v. *Stotts*, 467 U.S. 561, 603 n.7 (1984) (Blackmun, J., dissenting) ("The time pressures involved in a request for a preliminary injunction require courts to make determinations without the aid of full briefing or factual development, and make all such determinations necessarily provisional."); *S. Or. Barter Fair* v. *Jackson County*, 372 F.3d 1128, 1136 (9th Cir. 2004) ("[D]ecisions on preliminary

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[3] Given that *Hoevenaar* v. *Lazaroff*, 422 F.3d 366 (6th Cir. 2005), and *Warsoldier* both arose in the preliminary-injunction context, those decisions likewise do not create a circuit split. Contra Pet. 13 (asserting that these decisions create a split between the Sixth and Ninth Circuits); James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053, 2114-2115 (2009) (same).

injunctions are just that—preliminary—and must often be made hastily and on less than a full record."). Due to the posture of *Warsoldier*, and the attendant deficiencies of the record in that case, the Ninth Circuit did no more than opine as to the likelihood of success on the merits. See *Warsoldier*, 418 F.3d at 1002.

It remains to be seen how the Ninth Circuit will rule when called to give a final decision, with a full evidentiary record, on the validity of a prison grooming code under RLUIPA. The panel in such a case will not necessarily be bound by *Warsoldier*. Cf. *Pitt News* v. *Pappert*, 379 F.3d 96, 105 (3d Cir. 2004) (Alito, J.) ("[W]here the prior panel stopped at the question of likelihood of success[,] the prior panel's legal analysis must be carefully considered, but it is not binding on the later panel."); *Alcatel USA, Inc.* v. *DGI Techs., Inc.*, 166 F.3d 772, 793 n.85 (5th Cir. 1999) ("[P]ronouncements made during resolution of an appeal of a preliminary injunction are not binding."); *Ross-Whitney Corp.* v. *Smith Kline & French Labs.*, 207 F.2d 190, 194 (9th Cir. 1953) ("The ruling on the motion for a preliminary injunction leaves open the final determination of the merits of the case."). But cf. *Ranchers Cattlemen Action Legal Fund United Stockgrowers* v. *USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007) (noting that court of appeals' "conclusions on pure issues of law" from the "preliminary injunction phase" are law of the case). Petitioner's illusory circuit split could vanish when the Ninth Circuit squarely addresses this issue, so review in this Court is unnecessary.

3. This Court has rejected certiorari petitions similar to petitioner's, further suggesting the

absence of a genuine circuit split. Prior to *Warsoldier*, this Court denied two petitions seeking review of decisions that rejected RFRA challenges to prison grooming codes. See Petition for Writ of Certiorari, *Harris* v. *Chapman*, 520 U.S. 1257 (1997) (No. 96-8753); Petition for Writ of Certiorari, *Hamilton* v. *Schriro*, 519 U.S. 874 (1996) (No. 96-5016). Since *Warsoldier* was decided in 2005, this Court has denied three petitions seeking review of decisions that rejected RLUIPA challenges to prison grooming codes. See Petition for Writ of Certiorari, *Bisby* v. *Crites*, 130 S. Ct. 487 (2009) (No. 08-10337); Petition for Writ of Certiorari, *Ragland* v. *Powell*, 549 U.S. 1306 (2007) (No. 06-8887); Petition for Writ of Certiorari, *Hoevenaar* v. *Lazaroff*, 549 U.S. 875 (2006) (No. 05-11756). The petition in this case provides no reason to change course.

4. Petitioner asserts that the nonexistent circuit split over the legality of prison grooming codes "reflect[s] the deeper conflict over just what strict scrutiny means under RLUIPA." Pet. 17. This "deeper conflict" is a fine topic for law review commentary, as seen in the student note cited throughout the petition. Pet. 11, 18, 19 (citing James D. Nelson, Note, *Incarceration, Accommodation, and Strict Scrutiny*, 95 Va. L. Rev. 2053 (2009)). The issue is not suitable for consideration by this Court, however, because its resolution will not change the outcome of petitioner's case and thus is not the subject of "meaningful litigation." See *The Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving

conflicts among the Courts of Appeals is judicial, not simply administrative or managerial.").

Looking beyond his own request for an injunction as to the TDCJ grooming code, petitioner proposes a general inquiry into the appropriate level of judicial scrutiny under RLUIPA. See, *e.g.*, Pet. 4 (asking whether RLUIPA requires more than "a minimal showing that a prison grooming rule is the least restrictive means of furthering a compelling governmental interest"); *id.* at 17 (posing "the fundamental question of how much deference can be given to prison officials consistent with strict scrutiny"). Notwithstanding the supposedly divergent views of the circuits concerning "the meaning of strict scrutiny under RLUIPA," *id.* at 10-11, not one circuit has rendered a final decision on the merits holding that RLUIPA prohibits prison grooming codes. Petitioner contends the "decisions * * * are all over the lot," *id.* at 13, but the spectrum of outcomes is actually quite narrow, ranging from the many circuits that have squarely held that RLUIPA permits prison grooming codes, to the lone circuit that has held that RLUIPA *might not* permit prison grooming codes, see *supra* Sections (1)-(2). It is therefore unlikely that granting the petition to address the so-called "deeper conflict" would upset the judgment of the court below. This Court should decline petitioner's invitation to engage in a purely academic exercise.

5. In the absence of a circuit split over whether RLUIPA forbids prison grooming codes, that issue is best left to percolate in the lower courts. RLUIPA challenges to prison grooming codes are currently under review in the Fourth, Fifth, and Eleventh

Circuits. These cases allow the Court to wait and see whether a circuit split will ever develop.

The Fourth Circuit recently remanded a case for the district court to consider whether South Carolina's forcible grooming policy survives RLUIPA scrutiny. *Smith* v. *Ozmint*, 578 F.3d 246, 248 (4th Cir. 2009). In *Smith*, officers allegedly used physical force and pepper spray against a Rastafarian inmate in the course of shaving his head. *Id.* at 249-250. Facing a RLUIPA challenge, the officers defended the forcible grooming policy by filing an affidavit that had been submitted in a different case involving a different prison population. *Id.* at 252-254. Rejecting this affidavit as "simply not on point," and noting that its prior decisions upholding grooming codes had not involved forcible shaving, the Fourth Circuit vacated the summary judgment for the officers and remanded for further proceedings. *Id.* at 253-254. On remand, the United States District Court for the District of South Carolina granted summary judgment in favor of the officers, after reviewing new affidavits from South Carolina prison administrators. *Smith* v. *Ozmint*, No. 04-1819, slip op. at 16 (D.S.C. Mar. 18, 2010). The inmate's appeal is now before the Fourth Circuit. See Docket Report, *Smith* v. *Ozmint*, No. 10-6526 (4th Cir.).

The Fifth Circuit recently reversed the dismissal of a RLUIPA claim challenging application of the TDCJ grooming code to a prisoner seeking to grow a small patch of hair at the base of his skull, known as a kouplock. *Odneal* v. *Pierce*, 324 F. App'x 297, 302 (5th Cir. 2009) (per curiam). Noting that "there may be distinctions * * * between the security risks presented by prisoners maintaining a full head of

long hair and those wearing a small patch of long hair at the base of their skulls," the Fifth Circuit concluded that its prior decisions upholding grooming codes were not controlling. *Id.* at 301. The Fifth Circuit remanded for further proceedings on the RLUIPA claim concerning the kouplock, *id.* at 302, which are currently underway in the United States District Court for the Southern District of Texas, see Docket Report, *Odneal* v. *Dretke*, No. 04-454 (S.D. Tex.).

The Eleventh Circuit likewise remanded a RLUIPA case to the district court for "a full evidentiary hearing and bench trial" on the issue whether Alabama's grooming code is the least restrictive means of furthering the compelling governmental interest in prison security. *Lathan* v. *Thompson*, 251 F. App'x 665, 667 (11th Cir. 2007) (per curiam). The Eleventh Circuit, which had previously upheld prison grooming codes against RFRA and RLUIPA challenges, "note[d] that the evidentiary record relating to the hair-length claims is over ten years old and that, in the intervening time, prison staffing and administration, prison safety and security, and the prison population in Alabama have changed." *Id.* Proceedings are currently underway in the United States District Court for the Middle District of Alabama. See Docket Report, *Limbaugh* v. *Thompson*, No. 93-1404 (M.D. Ala.).

The legality of prison grooming codes under RLUIPA is the subject of active litigation in several circuits. The foregoing cases could produce a circuit split where none currently exists. In the meantime, review in this Court is premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SUPPLEMENTAL BRIEF FOR PETITIONER

The Acting Solicitor General agrees with petitioner that the court of appeals' judgment in this case is incorrect. U.S. Br. 18-20. He also agrees that the errors in reasoning that produced it are sufficiently clear and consequential to warrant summary reversal. *Id.* at 20. The Acting Solicitor General suggests, however, that the errors that produced the Fifth Circuit's fundamentally flawed judgment are case-specific enough to warrant denial of plenary review. *Id.* at 20-21. This appears to be only the third time in more than 50 years that the Office of the Solicitor General has made such a recommendation in response to a certiorari-stage order seeking the views of the United States.[1] In both of the prior cases, this Court granted plenary review and ultimately reversed the lower court's judgment. See *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447 (1993); *Norwest Bank Worthington* v. *Ahlers*, 485 U.S. 197 (1988).

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[1] We obtained these figures from a database containing information about 787 responses filed to certiorari-stage invitations between 1957 and through October Term 2008. See John F. Duffy, *The Federal Circuit in the Shadow of the Solicitor General*, 78 Geo. Wash. L. Rev. 518, 526 (2010) (reporting information from the database). We also consulted the Solicitor General's website, which contains all invitation briefs filed during October Terms 2009 and 2010. We found no cases other than those described above in which the Solicitor General suggested a summary reversal, or, in the alternative, denial of certiorari. We also found eleven cases since 1957 in which the Solicitor General recommended some combination of denial of certiorari or vacatur of the decision below.

The Court should do the same here. The conflict among the circuits is real and not going away. The decision below, while unpublished, simply repeats errors of published decisions, and it is not an outlier within the Fifth Circuit. Finally, the legal standard governing the "least restrictive means" requirement under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, is in grave need of clarification.

A. The Conflict Is Real

The Acting Solicitor General argues that there is no real conflict among the courts of appeals because they "are in agreement about how to apply RLUIPA's 'least restrictive means' standard." U.S. Br. 8. That is incorrect.

The main evidence of agreement offered by the Acting Solicitor General consists of a series of brief quotations that contain generic admonitions against "blindly accept[ing]" explanations offered by prison officials. U.S. Br. 10-11 (citation omitted). Agreement at that boilerplate level of generality, however, is hardly proof that no conflict exists. Instead, the relevant question is whether courts are applying different legal standards and reaching inconsistent results with respect to materially similar claims. The answer is yes.

The Fifth and Ninth Circuits have both acknowledged that their published decisions are in conflict with one another. In this case, the Fifth Circuit concluded that it was bound by its own

previous decisions in *Diaz* v. *Collins*, 114 F.3d 69 (1997), and *Longoria* v. *Dretke*, 507 F.3d 898 (2007), and it expressly refused to follow the Ninth Circuit's decision in *Warsoldier* v. *Woodford*, 418 F.3d 989 (2005). See Pet. App. 8a-10a & n.3. The Fifth Circuit's description of this conflict could not be clearer:

> The Ninth Circuit [in *Warsoldier*] found that the restriction [on hair length] was not the least restrictive means to maintain prison security, in part, because the prisons run by the federal government, Oregon, Colorado, and Nevada all permit long hair or provide religious exemptions to their hair length restrictions. * * *. This Court, however, is bound by *Diaz* and *Longoria*.

Id. at 10a n.3 (citation omitted). For its part, the Ninth Circuit recognized in *Warsoldier* that its analysis of these issues conflicted with the Fifth Circuit's analysis in *Diaz*:

> In * * * *Diaz v. Collins*, the Fifth Circuit upheld a prison grooming policy requiring that male inmates maintain short hair without discussing whether any other less restrictive means that could accomplish the same compelling interest were offered by the inmate or rejected by the prison. * * * But, under RLUIPA, [the state prison system] is *required* to demonstrate not only that that its policy serves a compelling interest, but also that it has employed the least restrictive means to achieve that compelling interest.

418 F.3d at 997 (citation omitted).

These differences in approach have produced different results. In *Warsoldier*, the Ninth Circuit granted relief to the inmate plaintiff, relying heavily on the fact "that other prison systems, including the Federal Bureau of prisons, do not have such hair length policies or, if they do, provide religious exemptions." 418 F.3d at 999. In another case, the Eleventh Circuit reversed a grant of summary judgment against a Native American inmate who was challenging a prison's total ban on long hair because "the evidentiary record relating to hair-length claims is over ten years old and * * *, in the intervening time, prison staffing and administration, prison safety and security, and the prison population of Alabama have changed." *Lathan* v. *Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007) (per curiam).

In *Longoria*, in contrast, the Fifth Circuit denied relief without inquiring about practices at other prisons, see 507 F.3d at 904, and, in this case, the Fifth Circuit viewed *Longoria* as rendering irrelevant petitioner's evidence that "other prison systems, including the Federal Bureau of Prisons, permit long hair," Pet. App. 10a n.3. In another case, the Sixth Circuit reversed a district court's carefully reasoned conclusion that prison officials had failed to demonstrate that a blanket rule against long hair was the least restrictive means of achieving adequate security, notwithstanding the lack of any evidence that previously recognized exceptions had resulted in security incidents. See *Hoevenaar* v. *Lazaroff*, 422

F.3d 366, 369-371 (2005), cert. denied, 549 U.S. 875 (2006).

The government suggests that these concededly "different results" can be explained away by the fact that different prisons and prison systems "hold different types of inmate populations and are subject to different types and degrees of logistical constraints." U.S. Br. 18. That is incorrect. In *Hoevenaar*, for example, the district court order overturned by the Sixth Circuit had been expressly limited to inmates with a "low security risk" and had called for a "case-by-case" assessment of whether an inmate should be permitted to grow a particular type of long hair. 422 F.3d at 369. And in *Fegans* v. *Norris*, 537 F.3d 897 (2008), the Eighth Circuit, like the Fifth Circuit here, treated a prisoner's claim to a religious exemption to a grooming policy as largely "foreclosed" by a "prior adjudication." *Id.* at 902 (citing *Hamilton* v. *Schriro*, 74 F.3d 1551-55 (8th Cir. 1996)). The Eighth Circuit did so despite the fact that the earlier case was decided twelve years earlier and involved a maximum security prison in another State, that women were not subject to the same grooming policy, and that exceptions were allowed for medical reasons. See *id.* at 911 (Melloy, J., concurring in part and dissenting in part). Cf. U.S. Br. 19.

The fact that courts are reaching different outcomes because they are applying different standards is further demonstrated by RLUIPA cases that do not involve grooming. The Fifth and Ninth Circuits, for example, have also reached different

results in diet cases. In that context, as in grooming cases, the Ninth Circuit has insisted that a prison cannot satisfy RLUIPA's least restrictive means test "unless it demonstrates that it actually considered and rejected" potentially less restrictive measures before refusing a religious accommodation. *Shakur* v. *Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (quoting *Warsoldier*, 418 F.3d at 996). Writing for the court in *Shakur*, Judge O'Scannlain rejected the prison officials' conclusory assertion that providing a kosher meal to a prisoner would be prohibitively costly and remanded for more specific evidence of alternatives. *Id.* at 889-891; see also *Koger* v. *Bryan*, 523 F.3d 789, 801 (7th Cir. 2008) (finding that a prison dietary policy was not the least restrictive means in light of a less burdensome policy employed by federal prisons).

In contrast, the Fifth Circuit denied the right of a Jewish inmate to receive kosher meals. *Baranowski* v. *Hart*, 486 F. 3d 112 (5th Cir.), cert. denied, 552 U.S. 1062 (2007). In doing so, the court emphasized the need to defer to prison officials about the cost of such an accommodation. *Id.* at 125-126. The court also accepted the always-available rationalization that granting an exemption to one group of prisoners "would breed resentment among other inmates; and that there would be an increased demand by other religious groups for similar diets." *Id.* at 125. But see *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 436 (2006) (*O Centro*) (rejecting a similar argument because it simply "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.").

If the Acting Solicitor General were correct, it would be sheer coincidence that the Fifth and Ninth Circuits have reached different results not just in grooming cases, but also in diet cases. But it is not a coincidence. In both sets of cases, the different results are the product of different legal standards, not different facts, and the Acting Solicitor General gives no reason to believe that these differences are likely to disappear absent this Court's intervention.

B. The Decision Below Is Not An Outlier

As the panel explained (see Pet. App. 8a-10a & n.3), the Fifth Circuit's unpublished decision in this case followed directly from its prior published decisions in *Longoria* and *Diaz*. In *Longoria* moreover, the Fifth Circuit concluded that *no* case-specific "evidentiary showing" was necessary because *Diaz* was "dispositive for Longoria's RLUIPA claim." 507 F.3d at 904; accord *Mayfield* v. *Texas Dep't of Criminal Justice*, 529 F.3d 599, 615 n.11 (5th Cir. 2008) (describing *Longoria* as having concluded that the Fifth Circuit's prior holding in *Diaz* made it unnecessary "to reexamine the TDCJ's religious grooming policy to reach a conclusion that Longoria failed to state a claim"). That is precisely the same error that the court of appeals made here.

The Acting Solicitor General nonetheless suggests that the Fifth Circuit's decision in this case is an outlier. In particular, he points to various unpublished decisions that, he asserts, show that "[t]he Fifth Circuit has required that Texas prison

officials justify their refusal to grant a religious exemption to TDCJ's grooming rule for the particular *type* of hair style the inmate seeks to grow." U.S. Br. 12 (emphasis added); see U.S. Br. 12 (discussing *Odneal* v. *Pierce*, 324 Fed. Appx. 297 (5th Cir. 2009) (per curiam) (involving hairstyle known as a "kouplock"); U.S. Br. 20 (citing *Gooden* v. *Crain*, 353 Fed. Appx. 885 (5th Cir. 2009) (per curiam) (beards)). Even if that were true, it would not address the core of the Fifth Circuit's error in *Longoria* and this case—namely, the failure to conduct any analysis that is particular to the specific *inmate* as opposed to the general *hairstyle*. Cf. *O Centro*, 546 U.S. at 430-431 (stating that, under the Religious Freedom Restoration Act, the government must "demonstrate that the compelling interest test is satisfied through application of the challenged law [to] * * * *the particular claimant* whose sincere exercise of religion is being substantially burdened" (emphasis added)).

At any rate, the unpublished decisions cited by the Acting Solicitor General do not purport to, and cannot, limit or alter the Fifth Circuit's published decisions in *Diaz* and *Longoria*. See Fed. R. App. P. 32.1; Rules and Internal Operating Procedures of the United States Court of Appeals for the Fifth Circuit, Rule 47.5.4.[2] In addition, an examination of the Fifth

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[2] Even if they could do so, moreover, they would merely succeed in bringing the Fifth Circuit closer to the Ninth Circuit at the expense of taking it further from the Sixth Circuit. In a decision discussed previously in this brief, see pp. 4-5, *supra*, the Sixth Circuit squarely *rejected* a district court's conclusion that RLUIPA required a case-by-case assessment of whether inmates with a low security risk

Circuit's other unpublished decisions reveals that the decision below is hardly an outlier, as these other decisions, like the one here, reject RLIUPA-based challenges to prison grooming policies based on nothing more than a citation of *Longoria* and/or *Diaz*. See *Bisby* v. *Crites*, 312 Fed. Appx. 631, 632 ("We have upheld TDCJ's grooming policies against a RLUIPA challenge. *See Longoria v. Dretke*, 507 F.3d 898, 904 (5th Cir. 2007)."), cert. denied, 130 S. Ct. 487 (2009); *Massingill* v. *Livingston*, 277 Fed. Appx. 491, 493 (2008) ("Massingill has failed to establish that any substantial burden placed on the practice of his religion outweighed the substantial interests of prison officials in safety, prisoner identification, and hygiene. *See Longoria v. Dretke*, 507 F.3d 898, 901-02 (5th Cir. 2007); *Diaz*, 114 F.3d at 72-73."). Far from demonstrating the lack of need for guidance from this Court, the Acting Solicitor General's exhaustive efforts to reconcile even the Fifth Circuit's own published and unpublished decisions demonstrate just how intractable the confusion is.

C. The Standard Governing RLUIPA Claims Is Not Clear

The government suggests that summary reversal would be appropriate in this case because the Fifth Circuit failed to apply "the correct legal standard" with respect to the application of RLUIPA's least restrictive means requirement. U.S. Br. 1, 21. Petitioner, of course, agrees with the United States that "the court of appeals * * * erred in affirming

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should permitted to wear precisely the same hairstyle that was at issue in *Odneal*. See *Hoevenaar*, 422 F.3d at 369-371.

the magistrate judge's grant of summary judgment to respondent on petitioner's hair-length claim" and that its errors in doing so were "clear." U.S. Br. 20. Accordingly, petitioner certainly would welcome summary reversal.

This case would seem to be a somewhat atypical candidate for that disposition, however. The reason is simple: contrary to the government's suggestion, "the correct legal standard" for applying the least restrictive means requirement in the prison setting is not settled. Indeed, the lack of clarity is precisely why the courts of appeals are in conflict and reaching different outcomes in factually similar RLUIPA cases. See pp. 4-7, *supra*.

One need only look at the government's brief to see that there are a number of open—and important—questions about the correct legal standard in this context. For example, the government suggests that prison administrators must "offer evidence" explaining the need for the restriction at issue (U.S. Br. 9); demonstrate that they "considered" alternative, less restrictive means (U.S. Br. 13); and "explain" why practices in different prison systems or in different prisons within the same State cannot be followed, provided that there is evidence about these other practices in the record (U.S. Br. 15).

The government remains remarkably vague, however, about the nature and rigor of the court's inquiry. The government never explains whether the standard it is proposing here is as rigorous as the

standard it suggested in *Johnson* v. *California*, 543 U.S. 499 (2005), where it argued that the narrow tailoring requirement in the prison security context requires "serious, good faith consideration of workable * * * alternatives." Brief for the United States as *Amicus Curiae* at 22 (No. 03-636) (internal quotation omitted). Nor does the government explain how, if at all, the standard it proposes squares with this Court's decisions in both *O Centro* and *Sherbert*, which impose a significant burden on defendants to prove that they have adopted the least restrictive means of achieving a governmental interest. See *O Centro*, 546 U.S. at 432-437; *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

The government also consistently sidesteps questions about the defendant's burden of production. The government carefully limits its discussion to "evidence in the record" or "alternatives specifically identified in the course of [an] administrative grievance process." U.S. Br. 14. But the government never discusses how that evidence gets into the record in the first place, whose responsibility it is to put it there, and what happens if they fail to do so. To the contrary, the government is conspicuously silent about what obligation defendants have to produce evidence to satisfy their burdens of production and persuasion, including, for example, evidence about conflicting practices within the same prison system. See 42 U.S.C. § 2000cc-5(2) (providing that the government's burden to demonstrate least restrictive means includes "the burdens of going forward with the evidence and of persuasion").

Summary reversal is most appropriate when the governing legal principles are widely understood and readily applied. See *Gonzales* v. *Thomas*, 547 U.S. 183, 185 (2006) (per curiam) (concluding that summary reversal was appropriate because the court of appeals' error was "obvious" in light of "basic legal principles") (internal quotation marks and citation omitted). In this context, the phrase "least restrictive means" is not self-defining, and this Court has not yet had the opportunity to articulate, clearly and fully, the governing standard for this crucial portion of RLUIPA. Thus, although petitioner would welcome a summary reversal, this Court's consideration of the issues this case raises could benefit from full briefing and argument, including participation by the United States.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

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In the Supreme Court of the United States

No. 09-1353

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v.

BILL PIERCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

The Acting Solicitor General makes an airtight argument for outright denial of the petition, even as he suggests that something more is in order. In the view of the United States, petitioner has identified a "case-specific error," U.S. Br. 8, and a splitless statutory issue, *id.* at 15-18. Being "keenly attuned to this Court's practice with respect to the granting or denying of petitions for certiorari," *FEC* v. *NRA Political Victory Fund*, 513 U.S. 88, 96 (1994), the Acting Solicitor General correctly concludes that the petition should be denied for these flaws, U.S. Br. 21.

Appended to this sound recommendation is an ill-conceived alternative: "grant the petition, summarily reverse the judgment of the court of appeals, and remand for further proceedings." U.S. Br. 21. The asserted basis for summary reversal further counsels denial by revealing the insignificance of this proposed error-correction mission. See *id.* at 18-21. It is said that the Fifth Circuit twice misjudged Fifth

Circuit precedent in holding that the TDCJ grooming code survives petitioner's challenge under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. 2000cc *et seq.* According to the Acting Solicitor General, the court below failed to apply its own admittedly correct RLUIPA standard because it overestimated the controlling effect of its prior decisions concerning the TDCJ grooming code.

Even were it true that the Fifth Circuit so erred, summary reversal would be inappropriate. In any event, the Fifth Circuit correctly applied its own precedent in affirming the judgment for respondents. Remanding this case may yield a second bench trial in the district court and a lengthier opinion from the court of appeals, but all this busywork is unlikely to change the outcome of litigation—only the quantity. The proposed summary reversal would needlessly tax the scarce resources of the federal courts, from top to bottom. Respondents urge the Court to follow the better of the Acting Solicitor General's two recommendations, by simply denying the petition.[1]

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[1] Respondents join the Acting Solicitor General in referring to "summary reversal." U.S. Br. 20. Were the Court to "remand for application of the correct legal standard," *id.* at 21, prior practice suggests it would *vacate* the judgment. See, *e.g.*, *Sears* v. *Upton*, 130 S. Ct. 3259, 3261 (2010) (per curiam); Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs—And an Alternative*, 107 Mich. L. Rev. 711, 717 n.19 (2009) ("Suppose * * * the Supreme Court determines that the court below erred by using an improper standard. The Supreme Court will often vacate and direct the court below to apply the proper standard to the facts, rather than the Court itself applying the correct standard and affirming or reversing.").

A. The Fifth Circuit's Purported Error, Which Concerns Only The Parties And Involves Mere Application Of Circuit Precedent, Does Not Warrant Summary Reversal

1. This Court is cautious in dispensing "the bitter medicine of summary reversal." *Spears* v. *United States*, 129 S. Ct. 840, 845 (2009) (Roberts, C.J., dissenting); see *Schweiker* v. *Hansen*, 450 U.S. 785, 791 (1981) (Marshall, J., dissenting) ("rare disposition"). Such sparing use makes sense, not least because "this Court is not a forum for the correction of errors." *Boag* v. *MacDougall*, 454 U.S. 364, 368 (1982) (Rehnquist, J., dissenting). Accordingly, a dose of summary reversal is not indicated to cure what is insignificant. See *Bd. of Educ.* v. *McKluskey*, 458 U.S. 966, 973 (1982) (Stevens, J., dissenting) (seeking "sufficient national importance to require summary reversal"); Eugene Gressman et al., *Supreme Court Practice* 351 (9th ed. 2007) [hereinafter *Stern & Gressman*] ("[T]he clearly erroneous decision correctible by summary reversal should involve an error of greater magnitude than the mere technical, harmless, or parochial error.").

The Acting Solicitor General does not favor the Court with an explanation of why his perceived error is so important as to warrant summary reversal. Indeed, he concedes that his advice addresses a "case-specific error." U.S. Br. 8. Petitioner and respondents are understandably interested in having the particular record they made at trial evaluated under the correct legal standard, but this is hardly a matter of public import. Cf. *Layne & Bowler Corp.* v. *W. Well Works, Inc.*, 261 U.S. 387, 393 (1923).

2. Nor does the Acting Solicitor General contend that the decision below squarely conflicts with any from this Court. Instead, he complains that the court of appeals failed to apply an agreeable RLUIPA standard already reflected in circuit precedent. U.S. Br. 20. Insignificance is thus doubled, along with the impropriety of summary reversal, because the Fifth Circuit's application of Fifth Circuit precedent is no concern of this Court. See *Presley* v. *Georgia*, 130 S. Ct. 721, 726 (2010) (Thomas, J., dissenting) ("[T]he Court should reserve [summary reversal] for cases that our precedents govern squarely and directly."). The error said to justify summary reversal is "an intramural matter to be resolved by the Court of Appeals itself." *Stern & Gressman*, *supra*, at 254.

Summary reversal is therefore inappropriate even if the Acting Solicitor General is right about the Fifth Circuit's having misapplied circuit precedent. And if he is wrong about that error—or if this Court declines to play the en banc court of appeals—then summary disposition will represent a lamentable development in the Court's GVR practice. This Court should not open a cage for the SRRCPASGS—the Summary Remand for Reapplication of Circuit Precedent upon the Acting Solicitor General's Suggestion. See *Webster* v. *Cooper*, 130 S. Ct. 456, 457 (2009) (Scalia, J., dissenting) (noting first SRMEOPR hatched in captivity); *Wellons* v. *Hall*, 130 S. Ct. 727, 733 (2010) (Scalia, J., dissenting) (welcoming SRIE, or SRTAEH, to the "growing menagerie"); *Jefferson* v. *Upton*, 130 S. Ct. 2217, 2229 (2010) (Scalia, J., dissenting) (classifying newly acquired SRPPRNHB).

B. The Fifth Circuit Correctly Affirmed The District Court's Denial, Following A Bench Trial, Of Petitioner's Grooming-Code Claim

1. The Acting Solicitor General believes "the [Fifth Circuit's] error in this case is clear." U.S. Br. 20. He is mistaken. Petitioner's RLUIPA challenge to the TDCJ grooming code presented a straightforward issue under the law of the circuit. Having decided a series of cases concerning the legality of that policy, the Fifth Circuit was familiar with the terrain. See, *e.g.*, *Powell* v. *Estelle*, 959 F.2d 22 (5th Cir. 1992) (per curiam); *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997); *Longoria* v. *Dretke*, 507 F.3d 898 (5th Cir. 2007) (per curiam). In *Odneal* v. *Pierce*, 324 F. App'x 297 (5th Cir. 2009) (per curiam), and elsewhere, the Fifth Circuit had demonstrated its full comprehension of what RLUIPA demands of government defendants. See U.S. Br. 12, 15-17 (noting Fifth Circuit precedent with approval); cf. *Davis* v. *Scherer*, 468 U.S. 183, 192 n.9 (1984) ("We see no reason to doubt * * * that the Court of Appeals * * * had full knowledge of its own precedents and correctly construed them.").

Odneal illustrates the Fifth Circuit's eye for subtle differences among grooming-code claims. BIO 14-15 (describing *Odneal*'s remand for proceedings concerning kouplock hairstyle). In this case, however, the panel saw no material distinction between petitioner's claim and those rejected in earlier decisions. Pet. App. 8a ("The magistrate judge properly found that [*Diaz*] and [*Longoria*] foreclosed Thunderhorse's RLUIPA claim against the TDCJ's hair length policy."). The court noted arguments and evidence concerning the policies of

other prisons and TDCJ's imperfect enforcement of its grooming code, but briskly concluded that *Diaz* and *Longoria* were controlling. *Id.* at 10a n.3.

2. By affirming a bench-trial denial of petitioner's grooming-code claim, the court of appeals impliedly held that respondents carried the RLUIPA burden of persuasion. See 42 U.S.C. 2000cc-1(a), 2000cc-2(b), 2000cc-5(2) (prescribing government's burdens of production and persuasion). Had the Fifth Circuit written an extra paragraph or two, it would be easier to discern why petitioner's "evidence of potentially less restrictive alternatives that was not part of an earlier case," U.S. Br. 19, did not counterbalance the winning evidentiary proffer TDCJ developed in prior litigation and employed in this case, see Pet. App. 9a n.2. Because the Acting Solicitor General equates silence on this point with summarily reversible error, it is well to note what might have been said in response to the "arguments and evidence not addressed in *Diaz* or *Longoria*." U.S. Br. 19.

a. Petitioner submitted evidence "that other prison systems (including the federal Bureau of Prisons) permit long hair." U.S. Br. 19. This was hardly news to the Fifth Circuit. See *Bisby* v. *Crites*, 312 F. App'x 631, 632 (5th Cir. 2009) (per curiam) (rejecting equal-protection claim and noting that "[plaintiff] does not indicate how prisoners in other state systems and the federal system are similarly situated to Texas prisoners"); *Powell*, 959 F.2d at 25 (discussing "testimony about experiences in other state prison systems" in pre-RFRA case).

Petitioner's evidence has only mild persuasive force. See *Fowler* v. *Crawford*, 534 F.3d 931, 941 (8th Cir. 2008) ("Courts have repeatedly recognized

that evidence of policies at one prison is not conclusive proof that the same policies would work at another institution." (internal quotation marks omitted)). Petitioner declares that prisons without grooming codes (or with religious exemptions to the same) successfully cope with "the same issues of preserving prison security as the TDCJ." Pet. 24. Nothing in the record proves that the comparison is apt. See Pet. App. 84a-86a. The Acting Solicitor General answers petitioner's point with a self-evident proposition: "Different prison systems * * * hold different types of inmate populations and are subject to different types and degrees of logistical constraints." U.S. Br. 18. Petitioner's comparative argument falsely assumes States without grooming codes have solved the challenges faced by TDCJ.

The Acting Solicitor General claims respondents have not "explain[ed] why the alternative, less restrictive practices utilized in other prison systems would not work in [petitioner's] unit." U.S. Br. 19. But the practice of those prisons—letting prisoners grow long hair—is *precisely* the alternative TDCJ has considered and rejected. See *Diaz*, 114 F.3d at 73; *Diaz* v. *Collins*, 872 F. Supp. 353, 358-359 (E.D. Tex. 1994). It is not as though TDCJ refuses to borrow another's innovative solution. Cf. *Cheema* v. *Thompson*, 67 F.3d 883, 885 n.3 (9th Cir. 1995) ("[T]he record included the policies of two California school districts, which allowed [Sikh daggers] so long as the blades were dulled, no more than 2 1/2 inches, and securely riveted to their sheaths. The natural question was why the same compromise would not work here."), cited in *Warsoldier* v. *Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005).

b. Petitioner also gave evidence, in the form of the grooming code itself, that TDCJ allows female inmates to grow long hair. Pet. 4. The Acting Solicitor General requests an explanation of why the "inconsistent application of the grooming policy to * * * Texas's female inmate population[] did not indicate that a less restrictive alternative was appropriate." U.S. Br. 19. The answer is that TDCJ's male and female inmates are not similarly situated, as courts have held in rejecting equal-protection challenges to the TDCJ grooming code. *Longoria*, 507 F.3d at 904-905; *Woods* v. *Johnson*, 1996 WL 458064, at *1 & n.6 (5th Cir. 1996) (per curiam); *Diaz*, 872 F. Supp. at 359 n.4.[2]

c. Finally, petitioner presented evidence that he and another inmate grew long hair while in TDCJ custody. Candid testimony from a TDCJ official explained this "fail[ure] to attain the unattainable—perfect consistency in enforcing the prison's rules." *Ustrak* v. *Fairman*, 781 F.2d 573, 575-576 (7th Cir. 1986) (Posner, J.). Given the security interests at stake, TDCJ endeavors to enforce its grooming code. See, *e.g.*, Bench Trial Tr. 23 (testimony of petitioner) ("I have disciplinary cases going back 30 years where I've repeatedly refused to comply with the grooming code * * * ."). Nevertheless, regrettable oversights in enforcement have occurred as a result of staff shortages. See *id.* at 222 (testimony of TDCJ official) ("I can tell you as an agency, the number one problem we face today is a shortage of 3,500

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[2] The Fifth Circuit might have said more about petitioner's gender argument had he included it in his briefs in that court.

correctional officers. When you're that short, there's some things that do not get accomplished in time, and there are sometimes [sic] in enforcement of the shaves. It is a definite safety issue * * * .").

C. The Proposed Remand Proceedings Would Consume Scarce Resources To No Good End

1. Justice Stevens once observed, "We are far too busy to correct every error that we perceive among the thousands of cases that litigants ask us to review." *McKluskey*, 458 U.S. at 972 (dissenting opinion). Suppose, however, that this Court puts aside other, more pressing business long enough to implement the Acting Solicitor General's summary-reversal proposal.[3] Then what?

2. The Acting Solicitor General suggests that, upon summary reversal and remand, the Fifth Circuit "should * * * remand[] the case to allow respondents to respond to petitioner's evidence of potentially less restrictive alternatives." U.S. Br. 20. It appears he would reset the matter for another bench trial before the Eastern District of Texas, although a lapse in familiarity with the case's procedural history may obscure his message. Compare *ibid.* (stating "the court of appeals in this case erred in affirming the magistrate judge's grant of summary judgment to respondent on petitioner's

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[3] See Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, 88 (1959) ("[M]any decisions on petitions for certiorari must call for sustained study. Notably is this true in the happily exceptional instances in which the Court simultaneously grants certiorari and summarily reverses the judgment below.").

hair-length claim"), with Pet. App. 3a (noting that appeal followed bench trial, not summary judgment).

At this second bench trial, respondents will build a longer record based on evidence entered in *Odneal*, thus meeting petitioner's effort to distinguish *Diaz* and *Longoria* on their facts. In *Odneal*, the kouplock case, TDCJ officials gave testimony explaining that TDCJ's inmate population is dissimilar to that of the Federal Bureau of Prisons; describing visits to prisons in other States with comparable populations; and confirming the unfeasibility of abandoning the grooming code. Defs.' Mot. Summ. J., Apps. B-C, *Odneal* v. *Dretke*, No. 04-cv-454, Doc. 155 (S.D. Tex.). Officials testified further that TDCJ's male inmates are demonstrably more likely than TDCJ's female inmates to act aggressively, hide dangerous contraband, and hazard escape. *Ibid.* With this additional evidence to insulate the TDCJ grooming code from petitioner's RLUIPA challenge, it is hard to imagine any result but judgment for respondents. After all, respondents won the first bench trial on the grooming-code claim, see Pet. App. 81a-83a, and their evidentiary proffer will improve in round two.

3. On appeal from the second bench trial, the Fifth Circuit is likely to affirm a judgment for respondents. The court of appeals might think it prudent to write an extra-credit opinion, its first composition having received a failing grade. Using approved Fifth Circuit materials, see U.S. Br. 12, 20, and taking care to show its work this time, the Fifth Circuit can explain that *Diaz* and *Longoria* are indistinguishable, notwithstanding petitioner's points concerning other prisons, female inmates, and imperfect enforcement. Judge Colloton's fine opinion

for the court in *Fegans* v. *Norris*, 537 F.3d 897 (8th Cir. 2008), might provide inspiration as the Fifth Circuit pens its third opinion in petitioner's case.

4. Summary reversal thus entails considerable expenditure of effort—by the district court, the court of appeals, and this Court—in pursuit of a better opinion justifying the same judgment. Such poor stewardship of scarce judicial resources is wasteful, even counterproductive. If "[b]usy appellate judges sometimes write imperfect opinions," *Calderon* v. *Coleman*, 525 U.S. 141, 147 (1998) (Stevens, J., dissenting), that is all the more reason to avoid pointless multiplication of their labors.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE,

Petitioner,

v.

BILL PIERCE, *et al.*,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents initially contend that the circuit split over the question presented by this case is "nonexistent," Opp. at 12, then that "the spectrum of outcomes is actually quite narrow," *id.* at 13, and finally that the contradictory decisions in the circuits should be left "to percolate." *Id.* at 13. These shifting and inconsistent arguments reveal precisely the disarray in the lower courts that warrants the grant of certiorari in this case. Respondents begin by listing the Fourth, Fifth, and Eleventh Circuits among those that "have all upheld prison grooming codes against RLUIPA challenges," *id.* at 6, and then end their brief by listing the same circuits as ones in which "RLUIPA challenges to prison grooming codes are currently under review." *Id.* at 13. They cannot have it both ways: that the law is settled in their favor and that it is unsettled and needs to develop further.

Respondents' main argument rests on the implausible premise that a ruling on a preliminary injunction cannot create a conflict among the circuits on the merits. They contend that *Warsoldier* v. *Woodford*, 418 F.3d 989 (9th Cir. 2005), which ordered entry of a preliminary injunction, either could not or did not constitute a binding interpretation of the Religious Land Use and Institutionalized Persons Act (RUILPA), 42 U.S.C. § 2000cc *et seq.* Respondents are wrong on both counts.

On appeal from the grant or denial of a preliminary injunction, "[r]eview properly extends to

all matters inextricably bound up with the injunction decision." 16 Wright, Miller & Cooper, Jurisdiction and Related Matters § 3921.1, at 27-28 (2d ed. 1996) (footnote omitted). As this Court has recognized, review can extend to the ultimate merits of the case. *Munaf* v. *Geren*, 128 S. Ct. 2207, 2219 (2008). And even review short of the merits can determine the outcome of the case, as this Court pointed out in *Winter* v. *Natural Resources Defense Council, Inc.*, 129 S. Ct. 365 (2008). In reversing the grant of a preliminary injunction there, this Court added "that it would be an abuse of discretion to enter a permanent injunction, after final decision on the merits, along the same lines as the preliminary injunction." *Id.* at 381. Any number of other decisions have made similar outcome determinative rulings on review of preliminary injunctions. *E.g.*, *New York State Board of Elections* v. *Torres*, 552 U.S. 196, 209 (2008) (no denial of First Amendment rights in judicial nominating process); *Rumsfeld* v. *Forum for Academic and Institutional Rights*, 547 U.S. 47, 55 (2006) (rejecting constitutional objections to required access of military recruiters to schools receiving federal funds).[1]

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[1] The cases cited by respondents concern a far different situation: where a court rules on a preliminary injunction, but explicitly refuses to decide a question going to the merits. Thus, in *New York State Liquor Authority* v. *Bellanca*, 452 U.S. 714, 716 (1981), this Court distinguished *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922 (1975), when that case "intimate[d] no view as to the ultimate merits." *Id.* at 934 (citation and internal quotation marks omitted). So, too, in *Pitt News* v. *Pappert*, 379 F.3d 96 (3d Cir. 2004), then-Judge Alito distinguished a prior decision in the same case because the earlier panel had not decided whether the

Respondents appear to be alone in their belief that *Warsoldier* is an impaired or limited precedent. The decision below, with which they otherwise agree, did not dismiss *Warsoldier* as a nonprecedent; the panel refused to follow it because it conflicted with Fifth Circuit precedent. Pet. at 10a n.3. The judges in the Ninth Circuit also would be surprised to learn that they were not bound by *Warsoldier*. They have repeatedly endorsed *Warsoldier* as binding law in that circuit. *E.g.*, *Navajo Nation* v. *U.S. Forest Service*, 535 F.3d 1058, 1077 (9th Cir. 2008) ("We held the prison policy imposed a substantial burden on Warsoldier's exercise of his religion because it coerced him to violate his religious beliefs under the threat of punishment."); *Alvarez* v. *Hill*, 518 F.3d 1152, 1167 (9th Cir. 2008) (quoting *Warsoldier* for proposition that prison officials "now must demonstrate that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice'").

As respondents concede, the Ninth Circuit understands that an appeal from a preliminary injunction can result in a binding decision on a pure question of law. Opp. at 11 (citing *Ranchers Cattlemen Action Legal Fund United Strockgrowers* v. *USDA*, 499 F.3d 1108, 1114 (9th Cir. 2007)). That is exactly what *Warsoldier* decided: that RLUIPA required more than conclusory statements from

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statute in question was constitutional. He added this all-important qualification: "Had [the prior panel] gone further and taken an unequivocal position on the merits, we would consider ourselves bound." *Id.* at 105.

prison officials "to explain why prisons in other jurisdictions and its own women's prisons are able to meet the same compelling interests of prison safety and security without requiring short hair or permitting a religious exemption." 418 F.3d at 1001.

Respondents imply that the precedential force of this holding in a published decision was later limited by the unpublished decision in *Haley* v. *Donovan*, 250 Fed. Appx. 202 (9th Cir. 2007). They convey this impression, however, only by means of selective quotation. Opp. at 9. In passages that respondents leave out, *Haley* characterized *Warsoldier* as holding that the prison officials "did not demonstrate that [the grooming regulation] was the least restrictive alternative," and that before *Warsoldier*, "it was not *yet* clearly established" that enforcement of prison grooming regulations against religious practices violated RLUIPA. 250 Fed. Appx. at 203 (emphasis added). The obvious import of these statements is exactly the opposite of respondents'. It is that after *Warsoldier*, it was "clearly established" that prison grooming rules did violate RLUIPA.

The district courts within the Ninth Circuit take the same view, as does the California Department of Corrections and Rehabilitation. The very case cited by respondents, *David* v. *Giurbino*, 488 F. Supp. 2d 1048 (S.D. Cal. 2007), establishes how pervasive the influence of *Warsoldier* has been. The district court described the decision in these terms:

> [T]he Ninth Circuit held that the CDCR's grooming regulations for male prisoners violated

> the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, because the policy was not the least restrictive means to achieve the state's compelling interest in maintaining prison safety and security. *See Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. July 29, 2005). In response to *Warsoldier* and other litigation, the CDCR filed emergency changes to its grooming regulations. *See* Initial Statement of Reasons ("ISOR") Grooming/ Programs, dated Dec. 29, 2005, attached to Compl. at Ex. II. The new grooming regulations, in relevant part, allowed an inmate's hair to be any length "but [hair] shall not extend over the eyebrows, cover the inmate's face or pose a health and safety risk." Cal.Code Regs. tit. 15, § 3062(e) (2006). The changes, which were operative on January 17, 2006, became final on July 27, 2006. Def.'s Mem. at 5; Cal.Code Regs. tit. 15, § 3062 and history thereof.

488 F. Supp. 2d at 1053. Respondents evidently would not give the same weight to rulings on preliminary injunctions as their counterparts in California. But the fact remains that others plainly have, resulting in the application of different rules in different parts of the country—precisely the conflict among the circuits that warrants review in this case.

This fact makes respondents' plea for further percolation in the lower courts particularly puzzling. They represent that the "illusory circuit split could vanish when the Ninth Circuit squarely addresses this issue." Opp. at 11. But they can point to no

indication, in the five years since *Warsoldier* was decided, that the Ninth Circuit is inclined to take this step. They also offer no evidence that the correctional departments in that circuit are willing to challenge the decision. The conflict among the circuits is not likely to go away. Nor is it likely to come to this Court from the Ninth Circuit.

Respondents refer to several RLUIPA cases, in which petitions for certiorari, filed *in forma pauperis*, were denied by this Court. Opp. at 12. Petitioner has already explained why this case is a superior vehicle for resolving the question presented here. Pet. at 21-22. Since then, this Court has granted certiorari in *Sossamon* v. *Texas*, 560 F.3d 316 (5th Cir. 2009), No. 08-1438 (cert. granted, May 24, 2010), presenting the question whether states and state officials are liable for damages under RLUIPA. That question is not implicated in this case, because petitioner has sought only injunctive relief, Pet. at 26a, but it does reveal how significant RLUIPA is. If the remedies available under RLUIPA warrant this Court's attention, then the standards for finding a violation of the statute do so even more.

Respondents contend that any attempt to clarify those standards and resolve the inherent tension between strict scrutiny under RLUIPA and due deference to prison officials would be "to engage in a purely academic exercise," with no relation to the outcome of this case. Opp. at 13. This contention is baffling. Every case, like this one, in which a prison rule imposes a substantial burden on religious

exercise, depends on how this tension is resolved. This case is not hypothetical, abstract, moot, or academic in any sense. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 130-31 (2007) (discussing these limits on a constitutional case or controversy). It is a live controversy over petitioner's exercise of his sincerely held religious beliefs, found by the lower courts to have been substantially burdened by the grooming rule in this case. Pet. at 8a-9a, 66a, 69a. Despite intimations to the contrary in their restatement of the facts, respondents do not seriously contest the sincerity of petitioner's religious beliefs or the findings below that the exercise of those beliefs was substantially burdened. Opp. at 1-3. Petitioner, for his part, does not challenge the fundamental interest in prison security. This case therefore reduces to the single question of whether respondents have met their burden of proving "least restrictive means" under RLUIPA. There is no other issue in this case and the outcome depends upon it.

Respondents contend that they have met their burden of proof based on an inventory from past precedent of the contraband found in prisoners' hair, a contention accepted by the court below. Opp. at 7-8. See Pet. at 8a-10a & n.3. Respondents argue for deference to this sample of past prison experience, entirely neglecting the present policies of many prisons to allow inmates to have long hair or to make exceptions for religious practice. See Pet. at 23-24. Respondents regard deference to the judgment of prison officials as a one-way street: when it works in their favor, they rely upon it, and when it doesn't,

they ignore it. But they cannot ignore the implications of their own argument. The more they contend that inmates' long hair presents a threat to prison security, the more they need to explain how other prisons can accommodate long hair as a religious practice. Their opposition says not one word about this issue.

RLUIPA puts the burden of proof on respondents on the issue of "least restrictive means." § 2(a), 42 U.S.C. § 2000cc-1(a). In RLUIPA and in its predecessor, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.*, Congress has twice required strict scrutiny of prison policies that substantially burden the religious exercise of prison inmates. If strict scrutiny under RLUIPA means anything at all, it means that some explanation must be forthcoming in this case—an explanation why a religious practice, widely allowed in other prisons, is not feasible in this one. This case sharply and clearly presents this question.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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June 2010

No. 09-1353

In the Supreme Court of the United States

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAPLAINCY DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in its application of the "least restrictive means" test of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. 2000cc *et seq.*, in upholding a prison grooming policy that prohibits inmates from growing long hair.

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In the Supreme Court of the United States

No. 09-1353

IRON THUNDERHORSE, PETITIONER

v.

BILL PIERCE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHAPLAINCY DIRECTOR OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's order inviting the Acting Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied, or, in the alternative, should be granted and the decision below summarily reversed and remanded for application of the correct legal standard.

STATEMENT

1. Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, to provide statutory protection against religious discrimination—including unequal treatment of religions in the provision of accommodations and unjustified infringement of the free exercise of

religion—by state and local governmental entities. The statute applies to two specific contexts: land use regulation and institutionalization. The provision at issue in this case is Section 3 of RLUIPA, which provides:

> (a) General rule. No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000cc-1. Section 4 of RLUIPA specifies that a "plaintiff shall bear the burden of persuasion on whether" a challenged law "substantially burdens the plaintiff's exercise of religion." 42 U.S.C. 2000cc-2(b). Section 6, in turn, makes clear that the government defendant bears the burdens of proof and persuasion on whether any burden imposed is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. 2000cc-5(2) (defining "demonstrates" to mean "meets the burdens of going forward with the evidence and of persuasion").

2. Petitioner is a prisoner in the custody of the Texas Department of Criminal Justice (TDCJ). Pet. App. 2a. In its Offender Orientation Handbook, TDCJ mandates the following cleanliness and grooming standards for male and female offenders, respectively:

> Male offenders must keep their hair trimmed up the back of their neck and head. Hair must be neatly cut. Hair must be cut around the ears. Sideburns will not extend below the middle of the ears. No block style, afro, natural or shag haircuts will be permitted. No fad or extreme hairstyles/haircuts are allowed. No mohawks, tails, or designs cut into the hair are allowed.
>
> Female offenders will not have extreme hairstyles. No mohawk, "tailed" haircuts or shaved/partially-shaved heads will be allowed. Female offenders may go to the beauty shop on their unit; however, going to the beauty shop is a privilege. Female offenders may be restricted from going to the beauty shop as the result of disciplinary action.

Pet. 3-4; see TDCJ, *Offender Orientation Handbook*, Ch. 1, § III.A, at 10-11 (Nov. 2004), http://www.tdcj.state.tx.us/publications/cid/OffendOrientHbkNov04.pdf. The handbook does not provide that exemptions from the grooming policy are available to accommodate religious practices.

Petitioner practices Native American Shamanism. Pet. App. 4a. In 2004, he was transferred from the Stiles Unit of the TDCJ to the Polunsky Unit. *Ibid.* According to his complaint, petitioner was able to maintain long hair, with braids falling to his lower back, as he alleges his religion requires, before he was transferred to the Polunsky Unit. *Ibid.* Petitioner also alleges that he was permitted other religious accommodations—such as wearing a colored headband, performing pipe ceremonies, and possessing other religious items—while in the general population and while in administrative segregation before his transfer to the Polunsky unit. *Ibid.* Af-

ter his transfer, petitioner alleges that guards at the Polunsky Unit confiscated his medicine bag, religious medallion, and quartz crystal. *Id.* at 5a. He further alleges that the harassment led to an altercation with a prison guard, which resulted in petitioner's being placed in administrative segregation, where he is not permitted to attend pipe ceremonies, conduct a pipe ceremony in his cell, or possess a flute or drum. *Ibid.* In addition, TDCJ does not allow petitioner to wear a colored headband, and refused to grant him an exception to its hair length restrictions so that he may maintain long hair in accordance with the tenets of his religion. *Id.* at 2a, 5a.

3. In October 2004, petitioner filed suit pro se under 42 U.S.C. 1983 and RLUIPA, alleging violations of his federal constitutional and statutory rights. Pet. App. 3a, 20a. Specifically, petitioner challenged TDCJ's (1) confiscation of various religious items, (2) denial of programs for shamans, (3) denial of a racial category for "Native Americans," (4) failure to provide exemptions or accommodations to the dress code and grooming code, (5) failure to allow equal services for inmates in segregation, and (6) failure to honor prior agreements that he had entered into with prison officials. *Id.* at 2a-3a, 61a. The case was assigned to a magistrate judge, who granted summary judgment for TDCJ on petitioner's RLUIPA claims. *Id.* at 3a. Petitioner appealed and the court of appeals vacated the grant of summary judgment and remanded for further proceedings. The court found that the magistrate judge had not given petitioner sufficient notice to allow him to properly respond to TDCJ's motions, and that the lack of notice had prevented petitioner from filing a "large amount of evidence." *Ibid.*

On remand, after holding a bench trial, the magistrate judge issued an opinion ordering that: (1) TDCJ

"recognize Native American Shamanism as a valid faith"; (2) petitioner be permitted to request the designation of a reasonable number of holy days and traditional foods for feast days, in conformity with TDCJ regulations; and (3) TDCJ allow petitioner reasonable access to various religious objects in the event that he is released from administrative segregation. Pet. App. 3a-4a. The judge denied all of petitioner's other requests for relief. *Ibid.* Regarding TDCJ's grooming policies, the magistrate judge held that petitioner's claim was foreclosed by a prior Fifth Circuit ruling that "upheld the dismissal of an inmate's challenge to the TDCJ's grooming code based on religious reasons." *Id.* at 69a (citing *Longoria* v. *Dretke*, 507 F.3d 898, 904 (5th Cir. 2007)).

4. Petitioner again appealed, challenging, among other things, the magistrate judge's dismissal of his RLUIPA claims. Pet. App. 2a. He argued that "the magistrate judge failed to analyze his claims under RLUIPA's compelling interest, least-restrictive-means standard of review." *Id.* at 8a. The court of appeals affirmed in an unpublished per curiam opinion. *Id.* at 1a-19a.

The court of appeals held that the magistrate judge correctly dismissed petitioner's RLUIPA challenge to TDCJ's grooming policy as foreclosed by circuit precedent. Pet. App. 8a. The court relied on *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997), and *Longoria*, *supra*, both of which concerned challenges to prison grooming policies on the ground that the policies imposed a substantial burden on the religious exercise of inmates who wanted to grow long hair for religious reasons. Pet. App. 8a-9a. In each case, the court of appeals noted, the grooming policy in question was upheld as "the least restrictive

way to serve a compelling governmental interest—prison security." *Ibid.*

As the court of appeals explained, Pet. App. 9a-10a, *Diaz* arose under RLUIPA's predecessor statute, the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*, before this Court invalidated that statute as applied to the States and their subdivisions. See *City of Boerne* v. *Flores*, 521 U.S. 507, 532-536 (1997); see also *Cutter* v. *Wilkinson*, 544 U.S. 709, 714-715 (2005) (describing background of RLUIPA). Like Section 3 of RLUIPA, RFRA requires governmental entities to justify imposing a substantial burden on religious exercise by demonstrating that doing so is the least restrictive means of furthering a compelling governmental interest. Compare 42 U.S.C. 2000bb-1(a) with 42 U.S.C. 2000cc-1(a). The court in *Diaz* found that TDCJ's grooming code was the least restrictive means of furthering the government's compelling interest in security because it prevented inmates from hiding weapons and other contraband in their hair and made it more difficult for escaped prisoners to alter their appearance. 114 F.3d at 73; see Pet. App. 9a. The *Diaz* court concluded that "the security interest at stake cannot meaningfully be achieved appropriately by any different or lesser means than hair length standards." 114 F.3d at 73. The court of appeals in this case observed that TDCJ had introduced "similar evidence" here, and that the Regional Director of the TDCJ had also testified that the policy prevented hair-grabbing during altercations. Pet. App. 9a n.2.

Relying on *Diaz*, the court in *Longoria* rejected a RLUIPA challenge to the same grooming policy that had been at issue in that case. See Pet. App. 9a. Noting that "the test under RLUIPA is sufficiently the same as

that previously imposed under RFRA," the court in *Longoria* upheld the grooming policy without requiring TDCJ "to demonstrate, as it did in *Diaz*, that its grooming policy 'is related to security, and, as such, involves a compelling state interest,' which 'cannot meaningfully be achieved appropriately by any different or lesser means than hair length standards.'" 507 F.3d at 904 (quoting *Diaz*, 114 F.3d at 73).

The court of appeals in this case acknowledged petitioner's argument that the policy could not be "the least restrictive means to maintain prison security[,] because the TDCJ [had] enforce[d] it in an arbitrary manner" (by previously allowing petitioner and other inmates to have long hair) and because "other prison systems, including the Federal Bureau of Prisons, permit long hair." Pet. App. 10a n.3. The court concluded, however, that it was "bound by *Diaz* and *Longoria*," and accordingly affirmed dismissal of petitioner's RLUIPA challenge to TDCJ's grooming policy. *Ibid.*; see *id.* at 10a.[1]

DISCUSSION

As numerous courts of appeals have affirmed, RLUIPA requires defendants to demonstrate that practices that impose substantial burdens on inmates' religious exercise are the least restrictive means of furthering a compelling interest under the facts of the particular case. Although the Fifth Circuit has recognized that principle in other cases, in its unpublished opinion in this case the court erroneously affirmed the dismissal of

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[1] The court also affirmed the magistrate judge's rejection of the remainder of petitioner's claims. Pet. App. 10a-19a. In his petition for a writ of certiorari, petitioner seeks review only of the court of appeals' ruling on his RLUIPA challenge to TDCJ's grooming policy. See Pet. i.

petitioner's RLUIPA challenge to TDCJ's grooming policy without requiring respondent to address record evidence that tended to show that prison officials potentially could further compelling governmental interests through less restrictive means. That case-specific error does not warrant plenary review by this Court. The Court may, however, wish to consider summarily reversing the judgment of the court of appeals and remanding for application of the correct standard.

A. The Courts Of Appeals Are In Agreement About How To Apply RLUIPA's "Least Restrictive Means" Standard

1. Section 3 of RLUIPA prohibits a government from imposing a substantial burden on the religious exercise of an institutionalized person unless the government can demonstrate that the burden is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. 2000cc-1(a). Although a plaintiff bears the burden of establishing that a challenged practice substantially burdens his religious exercise, see 42 U.S.C. 2000cc-2(b), RLUIPA places the burden on defendants to justify such a burden under the compelling-interest/least-restrictive-means test, 42 U.S.C. 2000cc-2(b), 2000cc-5(2).

In upholding RLUIPA against an Establishment Clause challenge in *Cutter* v. *Wilkinson*, 544 U.S. 709 (2005), this Court noted that "[c]ontext matters" in the application of RLUIPA's substantive standard. *Id.* at 723 (quoting *Grutter* v. *Bollinger*, 539 U.S. 306, 327 (2003)). The Court acknowledged that the lawmakers supporting RLUIPA "anticipated that courts would apply the Act's standard with 'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to

maintain good order, security and discipline, consistent with considerations of costs and limited resources.'" *Ibid.* (quoting *Joint Statement of Senator Hatch and Senator Kennedy on the Religious Land Use and Institutionalized Persons Act of 2000*, 146 Cong. Rec. 16,699 (2000) (*Joint Statement*)); *id.* at 725 n.13 ("It bears repetition, however, that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area."). Those lawmakers also recognized, however, that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements." *Joint Statement*, 146 Cong. Rec. at 16,699 (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).

2. As a general matter, courts of appeals evaluating prisoners' RLUIPA claims have correctly enforced RLUIPA's allocation of burdens. In so doing, they have appropriately balanced the deference due to the expertise of prison administrators with RLUIPA's requirement that defendants do more to justify the imposition of a substantial burden on religious exercise than rely on speculation or unjustified fears. Courts have performed that balancing by requiring prison administrators to offer evidence—usually in the form of affidavits from prison officials—explaining how the imposition of an identified substantial burden furthers a compelling governmental interest and why it is the least restrictive means of doing so, with reference to the circumstances presented by an individual case. Once a defendant has offered such evidence, courts have granted due deference to the expertise brought to bear in formulating the prison's policies.

a. The First Circuit, for example, has made clear that prison officials must "do more than merely assert a security concern" in order to justify imposing a substantial burden. *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 39 (2007) (quoting *Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004), cert. denied, 543 U.S. 991 (2004)). Although that court recognized that "prison officials are to be accorded deference in the way they run their prisons," the court explained that "this does not mean that [the court] will rubber stamp or mechanically accept the judgments of prison administrators." *Id.* at 40 (internal quotation marks and citation omitted). Other courts of appeals agree. See, *e.g.*, *Jova* v. *Smith*, 582 F.3d 410, 415 (2d Cir. 2009) (noting that "the state may not merely reference an interest in security or institutional order in order to justify its actions; rather, 'the particular policy must further this interest'; and must be more than conclusory") (internal citation omitted), cert. denied, 130 S. Ct. 2111 (2010); *Washington* v. *Klem*, 497 F.3d 272, 283 (3d Cir. 2007) ("Even in light of the substantial deference given to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest. A conclusory statement is not enough.") (internal citations omitted); *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006) ("Here, the first job is to require [the defendant prison] to take the unremarkable step of providing an explanation for the policy's restrictions that takes into account any institutional need to maintain good order, security, and discipline, or to control costs. That explanation, when it comes, will be afforded due deference."); *Sossamon* v. *Texas*, 560 F.3d 316, 335 (5th Cir. 2009)

(noting that a State's "conclusional assertion" regarding the least restrictive means of furthering a compelling interest is not sufficient to justify imposition of a burden), cert. granted, No. 08-1438 (argued Nov. 2, 2010); *Hoevenaar* v. *Lazaroff*, 422 F.3d 366, 370 (6th Cir. 2005) (acknowledging that "the district court is not required to blindly accept any policy justifications offered by state officials"), cert. denied, 549 U.S. 875 (2006); *Koger* v. *Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) ("We can only give deference to the positions of prison officials as required by [*Cutter*] when the officials have set forth those positions and entered them into the record."); *Murphy* at 988-989 ("Although we give prison officials wide latitude within which to make appropriate limitations, they must do more than offer conclusory statements and post hoc rationalizations for their conduct.") (internal quotation marks omitted); *Warsoldier* v. *Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) (finding that prison's "conclusory statements are insufficient to meet its burden that it has adopted the least restrictive means to achieve [a compelling] interest"); *Lathan* v. *Thompson*, 251 Fed. Appx. 665, 667 (11th Cir. 2007) (unpublished) (per curiam) (remanding a RLUIPA claim to the district court so that prison officials could present evidence that was not "over ten years old" to justify the restriction at issue in that case).[2]

b. The courts of appeals have, moreover, undertaken case-specific evaluations of RLUIPA defendants' asserted justifications for imposing substantial burdens on prisoners' religious exercise. The Fourth Circuit, for example, has rejected prison officials' reliance on an affi-

[2] Neither the Tenth nor D.C. Circuit appears to have addressed the burden RLUIPA places on prison officials to justify imposing a substantial burden on an inmate's religious exercise.

davit justifying a challenged grooming policy, but created for different litigation involving a different institution, because the affidavit "had nothing to do" with the institution at issue in the case and was, therefore, "simply not on point." *Smith* v. *Ozmint*, 578 F.3d 246, 252-254 (2009).

The Fifth Circuit has required that Texas prison officials justify their refusal to grant a religious exemption to TDCJ's grooming rule for the particular type of hair style the inmate seeks to grow. *Odneal* v. *Pierce*, 324 Fed. Appx. 297, 300-301 (2009). In that case, the plaintiff sought permission to grow a long patch of hair at the base of his neck called a kouplock. *Id.* at 301. The court rejected Texas's reliance on *Diaz* v. *Collins*, 114 F.3d 69 (5th Cir. 1997)—one of the two decisions on which the court of appeals relied in this case, see Pet. App. 9a—which upheld application of the grooming rule to long braids. The court explained that "RLUIPA's rules cannot be applied to a particular governmental policy in a generic fashion; it is not enough to say that the 'grooming policy' has been upheld when the case at hand deals with [a requested hairstyle that is] potentially very different from" the one considered in the prior case. *Odneal*, 324 Fed. Appx. at 300. As the Fifth Circuit stated in another case, a court reviewing a prisoner's RLUIPA claim must "'examin[e] the particular facts of the case' before it." *Newby* v. *Quarterman*, 325 Fed. Appx. 345, 351 (2009).[3]

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[3] That approach is consistent with this Court's interpretation of RFRA, which employs the same substantive standard as RLUIPA. In *Gonzales* v. *O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430 (2006) (*O Centro*), for example, the Court held that the federal government could not satisfy RFRA by arguing that a statutory scheme "simply admits of no exceptions." Rather, "RFRA operates by man-

c. Finally, as a means of ensuring that prison officials demonstrate that the application of a challenged practice to a particular plaintiff is the least restrictive means of furthering a compelling governmental interest, the courts of appeals have required that officials demonstrate that they have considered whether there are alternative, less restrictive means of furthering the relevant interest. No court of appeals requires prison officials to undertake the "herculean burden" of "refut[ing] every conceivable option in order to satisfy the least restrictive means prong of" RLUIPA. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1556 (8th Cir.), cert. denied, 519 U.S. 874 (1996). But the courts of appeals that have reached the question agree that, when there is evidence that potentially less restrictive alternatives exist, prison officials must at least demonstrate that they have "considered and rejected the efficacy of" those alternatives. *Warsoldier*, 418 F.3d at 999; see, *e.g.*, *Washington*, 497 F.3d at 284 (noting that prison must "consider and reject other means before it can conclude that the policy chosen is the least restrictive means"); *Murphy*, 372 F.3d at 989 (remanding for further proceedings where it was "not clear that [the defendant] seriously considered any other alternatives, nor were any explored before the district court"). Consistent with that practice, the courts of appeals have upheld rulings in favor of

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dating consideration * * * of exceptions to 'rule[s] of general applicability.'" *Id.* at 1223 (quoting 42 U.S.C. 2000bb-1(a)). The Court noted that RFRA had expressly adopted the compelling interest test as set forth in cases such as *Sherbert* v. *Verner*, 374 U.S. 398 (1963), in which the "Court looked beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants." *O Centro*, 546 U.S. at 431.

prison defendants when the defendants have explained why specific less restrictive alternatives are not feasible. *E.g.*, *Williams* v. *Snyder*, 367 Fed. Appx. 679, 681-683 (7th Cir.) (unpublished order), cert. denied, 131 S. Ct. 343 (2020); *Gooden* v. *Crain*, 353 Fed. Appx. 885, 889 (5th Cir. 2009) (unpublished) (per curiam); *McRae* v. *Johnson*, 261 Fed. Appx. 554, 559 (4th Cir. 2008) (unpublished) (per curiam); *Fegans* v. *Norris*, 537 F.3d 897, 904 (8th Cir. 2008).

At a minimum, defendants' obligation to address potential alternatives extends to those alternatives specifically identified in the course of the administrative grievance process. Incarcerated persons are required by the Prison Litigation Reform Act of 1995, 42 U.S.C. 1997e(a), to exhaust administrative grievance procedures prior to filing a lawsuit, including a suit to enforce RLUIPA. See *Cutter*, 544 U.S. at 723 n.12. The requirement that an inmate request a religious accommodation through a prison's internal grievance procedures permits prison officials and inmates to work together in the first instance to come up with workable solutions that balance an inmate's religious exercise with an institution's compelling interests. That process also serves the function of developing an evidentiary record about what potential alternatives would be acceptable to a plaintiff and why such alternatives would or would not work for an institution. If an inmate ultimately files suit under RLUIPA, a defendant should be prepared to address the feasibility of potential alternatives identified through the administrative process.

Moreover, when there is evidence in the record that different prison systems—or different prisons within the same system—provide exemptions to a rule that imposes a substantial burden on religious exercise or otherwise

utilize less restrictive means of furthering their interests, the courts of appeals properly require defendants to explain why they cannot adopt those less restrictive practices. *E.g.*, *Fegans*, 537 F.3d at 905; *Kroger*, 523 F.3d at 801; *Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 1000. The same is true with respect to evidence that the defendant institution permits exemptions for some purposes, religions, or populations, but not for others. *E.g.*, *Sossamon*, 560 F.3d at 335; *Newby*, 325 Fed. Appx. at 352; *Mayfield* v. *TDCJ*, 529 F.3d 599, 615 (5th Cir. 2008). At the same time, courts recognize that "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution." *Spratt*, 482 F.3d at 42; see *Fegans*, 537 F.3d at 905 ("Although prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers."). In the face of evidence that other institutions employ less restrictive means, an institution must satisfy the same burden generally applicable under RLUIPA: it must demonstrate that its practices are the least restrictive means of furthering its compelling interest under the facts at issue in the particular case.

3. Petitioner argues (Pet. 10-11) that the courts of appeals are divided "over the meaning of strict scrutiny under RLUIPA." In particular, petitioner contends that (Pet. 11), although seven circuits "require the government to submit specific evidence and closely examine it on the issue of least restrictive means," the Fifth and Sixth Circuits simply "accept the government's own as-

sertion of what constitutes least restrictive means." That contention is incorrect.

In addition to this case and the *Diaz* and *Longoria* decisions on which it relies, petitioner's assertion about the law in the Fifth Circuit rests on *Baranowski* v. *Hart*, 486 F.3d 112, cert. denied, 552 U.S. 1062 (2007). In *Baranowski*, the Fifth Circuit upheld a district court's determination that Texas did not violate RLUIPA by refusing to provide kosher meals to inmates. *Id.* at 125-126. Although petitioner asserts that the Fifth Circuit in that case reached that conclusion by merely "accept[ing] the assertion of prison officials that denial of a religious diet was 'related to maintaining good order and controlling costs and as such, involves compelling government interests,'" Pet. 13 (quoting *Baranowski*, 486 F.3d at 125), the court in fact based its conclusion on the "uncontroverted summary judgment evidence" prison officials had submitted to justify their choice to offer inmates vegetarian or pork-free meals instead of "either providing a separate kosher kitchen or bringing in kosher food from outside," *Baranowski*, 486 F.3d at 125. That evidence included an affidavit attesting that prison officials had "studied the impact of complying" with requests to provide a separate kosher kitchen or kosher meals from outside the facility, including by examining the practices of the Florida prison system. *Id.* at 118. The affidavit concluded that the cost to Florida of providing kosher meals ($12 to $15 per day per offender, as compared to the $2.46 per day the State of Texas paid for each offender's meals) was not feasible in light of constraints on TDCJ's budget, and that "[p]roviding kosher meals for a very small subset of offenders would place a tremendous burden on the ability of TDCJ to provide a nutritionally appropriate meal to all other

offenders." *Ibid.* In concluding that the record was sufficient to uphold the prison policy, the court of appeals in *Baranowski* did precisely what petitioner appears to suggest a court evaluating such a claim ought to do: it verified that the defendants had provided an actual explanation—not merely conclusory statements—that their practice was the least restrictive means of furthering governmental interests, and that they had considered and rejected potential alternatives, including the practice of a different prison system. *Id.* at 125-126.

In *Hoevenaar*, the Sixth Circuit reversed the grant of a preliminary injunction permitting an inmate to grow a kouplock as an exception to the prison's general grooming policy. 422 F.3d at 369-371. In so doing, the court examined record evidence indicating that the "district court's solution of allowing kouplocks on an individualized basis for low-threat prisoners was not sufficient to protect the state's interest in safe and secure prisons." *Id.* at 371. Although, as petitioner notes (Pet. 16), prison officials had not produced data showing "that previously recognized exceptions had resulted in security incidents," the court of appeals reviewed evidence that "contraband was a problem for all types of prisoners"; that the plaintiff in the case "ha[d] a long history of possessing and hiding contraband," and had "twice attempted to escape from prison, utilizing contraband"; and that "contraband could be hidden in a kouplock, including dangerous items, such as an ice pick," as well as various types of small items the plaintiff "had previously been found guilty of possessing." *Ibid.* The court of appeals, in short, did not rest its decision on "simple assertions of security," Pet. 12; it instead ensured that prison officials had offered a substantive and relevant justification for the burden they were imposing, and that

the officials had considered any alternatives suggested in the case.

Finally, petitioner notes (Pet. 13-18) that some courts of appeals have upheld restrictive grooming policies in the face of RLUIPA challenges while at least one court has granted a preliminary injunction requiring a religious exception to such a policy. See *Warsoldier*, *supra*. That different courts have reached different results in different cases is, however, unremarkable, particularly given RLUIPA's requirement that courts consider the circumstances of the particular parties before it. See 42 U.S.C. 2000cc-1(a) (requiring that defendant justify "imposition of the burden on that person"). Different prison systems, and different facilities within a single prison system, hold different types of inmate populations and are subject to different types and degrees of logistical constraints. The courts of appeals' context-specific decisions do not, as petitioner suggests (Pet. 10, 17), reflect any general disagreement among the courts of appeals about the correct legal standard.

B. The Court Of Appeals In This Case Erroneously Departed From Accepted Standards Governing Inmates' RLUIPA Claims

1. Although petitioner fails to identify a general conflict about the standard applicable to inmates' RLUIPA claims, he is correct that the court of appeals failed to apply the correct standard in this case. In its unpublished, per curiam opinion affirming the dismissal of petitioner's RLUIPA challenge to TDCJ's grooming policy, the court of appeals concluded that the challenge was foreclosed by prior Fifth Circuit decisions rejecting similar challenges brought by prisoners in other TDCJ facilities. Pet. App. 8a-10a (citing *Diaz* and *Longoria*,

supra). But petitioner in this case raised arguments and evidence not addressed in *Diaz* or *Longoria*: that other prison systems (including the federal Bureau of Prisons) permit long hair, and that TDCJ enforces its grooming policy in an inconsistent manner. *Id.* at 10a n.3. The courts below, however, never required respondents to explain why the alternative, less restrictive practices utilized in other prison systems would not work in the Polunsky unit. Nor did they require prison administrators to explain why the previous inconsistent application of the grooming policy to petitioner and to others (including Texas's female inmate population) did not indicate that a less restrictive alternative was appropriate. See *ibid.* Although respondent acknowledges (Br. in Opp. 14-15 (citing *Odneal*, *supra*)) that the Fifth Circuit requires prison officials to justify application of a challenged policy under the facts of a particular case, respondent notably does not even attempt to justify the court of appeals' refusal to hold officials to that standard in this case.

The court of appeals erred in affirming the dismissal of petitioner's RLUIPA challenge in the absence of such explanations. Although courts are certainly entitled to take into account a prior adjudication of the legitimacy under RLUIPA or RFRA of a particular prison practice, RLUIPA's requirement that courts focus on the particular facts of the case before it can make exclusive reliance on such a prior holding inappropriate. What is impossible in one institution or system may be possible—and therefore possibly required under RLUIPA—in another facility or system. In addition, when a subsequent case includes evidence of potentially less restrictive alternatives that was not part of an earlier case, simple reliance on the previous decision cannot suffice under RLUIPA.

As noted above, see p. 12, *supra*, the Fifth Circuit in other cases has recognized that its prior decision in *Diaz* is "not dispositive" of all challenges to TDCJ's grooming policy, and it has emphasized that "RLUIPA's standards cannot be applied to a particular governmental policy in a generic fashion." *Odneal*, 324 Fed. Appx. at 301 (remanding for consideration of application of TDCJ's policy to a plaintiff wishing to maintain a kouplock); see also *Gooden*, 353 Fed. Appx. at 861 n.1. The Fifth Circuit has, moreover, made clear that a RLUIPA defendant bears the burden of "explaining why [a plaintiff's proposed] alternative would be unfeasible, or why it would be less effective in maintaining institutional security," *id.* at 888, and that "allegations of disparate application" of a challenged policy "might provide a reasonable basis for a factfinder to conclude that the [challenged] policy is not the least restrictive means of furthering a compelling government interest," *Newby*, 325 Fed. Appx. at 352; see *Mayfield*, 529 F.3d at 615. By those standards, the court of appeals in this case erred in affirming the magistrate judge's grant of summary judgment to respondent on petitioner's hair-length claim. The court should have remanded the case to allow respondents to respond to petitioner's evidence of potentially less restrictive alternatives.

2. Because the court's error in this case is clear, it may be an appropriate candidate for summary reversal. In any event, for the reasons explained above, see pp. 8-18, *supra*, the court's error does not reflect any general disagreement among the courts of appeals about the correct legal framework under RLUIPA, including the burden a defendant must bear to satisfy the compelling-interest/least-restrictive-means test, that requires resolution by this Court. Unless the Court opts to sum-

marily reverse the court of appeals and remand for application of the correct legal standard, it should deny the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court should grant the petition, summarily reverse the judgment of the court of appeals, and remand for further proceedings.

Respectfully submitted.

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